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Courts, Privacy and Data Protection in the Digital Environment

Maja Brkan (ed.), Evangelia Psychogiopoulou (ed.)
Reviewed by Nicolo Zingales

Over the last decade, European courts have played a pivotal role in the development of the law of privacy and data protection in the digital environment. This is particularly evident when one looks at the series of judgments handed down after the entry into force of the Charter of Fundamental Rights by the CJEU, which has given an expansive interpretation of the rights to privacy and data protection and striven to provide individuals with “effective and complete” protection of those rights in a drastically changing technological context.

While it is often argued that similar dynamics have been at play at the national level, a comparative discussion highlighting differences and peculiarities of the relevant legal frameworks appears to be missing from the literature. This book contributes to filling that gap, by offering an insightful helicopter view of several distinct legal frameworks for privacy and data protection (first, the European Union and the European Convention of Human Rights; and subsequently, Belgium, Finland, Germany, Greece, Italy, The Netherlands, Slovakia, Spain and the United Kingdom) and of the significance of fundamental rights influences from CJEU and the ECtHR in giving shape to those frameworks. It does so through a particular lens, moreover, which is the permeability of each legal framework to strategic litigation, defined as “litigation that is primarily concerned with law and policy reform, based on the selection of cases that allow litigants to penetrate deeper into and address wider societal problems” (p. 6). This approach calls for interesting parallels and paves the way for a reflection on the crucial importance of certain rules, such as those relating to representative and collective action, in encouraging private enforcement.

Country chapters are especially suited for comparison, following an identical structure: an overview of the legal framework; the relevant jurisprudence; the influence by CJEU and ECtHR; patterns of litigation; and a conclusion. In turn, chapters 2 and 3, preceded by a general introduction, lay the foundations for analysis and comparison in the rest of the book. Regrettably, while one would expect a clear linkage between those initial chapters and the developments described in the country chapters, this has not always been done clearly and consistently. For instance, the excellent categorization of cases delineating the interactions between privacy and data protection in chapter 2.2 does not appear to have been used or referenced in the country chapters. A similar comment could be made about the characteristics

of balancing between different rights emphasised in chapter 2.4; although one should also acknowledge that identifying the subjects, the purpose and the mechanisms of balancing in each case would have arguably gotten in the way of the comprehensiveness of developments covered by contributors. By the same token, chapter 3 is predominantly focused on balancing between privacy and other rights or interests (“free speech” and national security and the prevention of crime), offering a clear and succinct review of a number of topical cases; however, probably due to space constraints, it limits itself to a short mention (p. 33) of how the multiform notion of the right to private life in the ECHR relates to the protection of personal data. If more extensively articulated, this would have been a useful reference to thread between the various book chapters.

The important added value of the country chapters (4-12) is to provide a snapshot in English of the institutional features and key developments for privacy and data protection in the examined jurisdictions, giving the reader an informed view of the approach taken by national courts (especially constitutional or supreme courts) towards European influences. These chapters illustrate the wide range of issues impacted by privacy and data protection law; they also show a varying degree of reception of supranational law, and a fragmented and underdeveloped landscape for strategic litigation. Conceivably, the failure by the great majority of authors to identify patterns of “strategic” litigation is related to the wide-ranging nature of interests and issues coalescing around the notion privacy, which could be narrowed by scoping the inquiry around specific sets of cases or scenarios.

The editors do present the country chapters together as part of a homogenous discourse (pp. 8-9), but fall short of providing a layer of analysis explaining or justifying the findings of the inquiry. This may well be part of a broader project, involving a larger sample of countries and a more structured set of questions, and perhaps even a recognition of the role of data protection authorities; yet while it is certainly hoped that the editors take this to the next level, they should be praised for the idea and for having enriched our understanding of judicial litigation in privacy and data protection law.