Privacy as virtue

Moving beyond the individual in the age of big data

van der Sloot, B.

Publication date
2017

Document Version
Other version

License
Other

Citation for published version (APA):
van der Sloot, B. (2017). Privacy as virtue: Moving beyond the individual in the age of big data.
Privacy as Virtue discusses whether a rights-based approach to privacy regulation still suffices to address the challenges triggered by new data processing techniques such as Big Data and mass surveillance. A rights-based approach generally grants subjective rights to individuals to protect their personal interests. However, large-scale data processing techniques often transcend the individual and their interests.

Virtue ethics is used to reflect on this problem and open up new ways of thinking. A virtuous agent not only respects the rights and interests of others, but also has a broader duty to act in the most careful, just and temperate way. This applies to citizens, to companies such as Apple, Google and Facebook and to governmental organizations that are involved with large scale data processing alike.

The author develops a three-layered model for privacy regulation in the Big Data era. The first layer consists of minimum obligations that are independent of individual interests and rights. Virtuous agents have to respect the procedural pre-conditions for the exercise of power. The second layer echoes the current paradigm, the respect for individual rights and interests. While the third layer is the obligation of aspiration: a virtuous agent designs the data process in such a way that human flourishing, equality and individual freedom are promoted.
PRIVACY AS VIRTUE
School of Human Rights Research Series, Volume 81

A commercial edition of this dissertation will be published by Intersentia under ISBN 978-1-78068-505-2

The titles published in this series are listed at the end of this volume.

No part of this publication may be reproduced, stored in an automated data system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise, without the prior written permission from the author/publisher.
PRIVACY AS VIRTUE

Moving Beyond the Individual in the Age of Big Data

ACADEMISCH PROEFSCHRIFT

ter verkrijging van de graad van doctor aan de Universiteit van Amsterdam op gezag van de Rector Magnificus prof. dr. ir. K.I.J. Maex ten overstaan van een door het College voor Promoties ingestelde commissie, in het openbaar te verdedigen in de Agnietenkapel op vrijdag 30 juni 2017, te 10.00 uur

door Bart van der Sloot geboren te Nijmegen
Promotiecommissie:
Promotor: prof. dr. N.A.N.M. van Eijk, Universiteit van Amsterdam
Promotor: prof. dr. B. Roessler, Universiteit van Amsterdam
Copromotor: Prof. dr. N. Helberger, Universiteit van Amsterdam

Overige leden:
prof. dr. C.J. Hoofnagle Berkeley Law
prof. dr. R.E. Leenes Tilburg University
prof. dr. D.W.J. Broeders Erasmus Universiteit Rotterdam
prof. dr. M.M.M. van Eechoud Universiteit van Amsterdam
prof. dr. S. Klous Universiteit van Amsterdam
prof. dr. E.E.O. Roos Lindgreen Universiteit van Amsterdam
dr. F.J. Zuiderveen Borgesius Universiteit van Amsterdam

Faculteit der Rechtsgeleerdheid
# CONTENTS

Chapter I
Introduction ................................................................. 1

Chapter II
The Transformation of the Right to Privacy and the Right to Data Protection .... 11
1. Introduction ................................................................. 11
2. The right to privacy ......................................................... 13
   2.1. Right to complain ..................................................... 17
   2.2. Interests ................................................................. 23
   2.3. Assessments ............................................................ 29
   2.4. Enforcement ........................................................... 35
3. Data Protection ............................................................ 39
   3.1. Obligations of the data processor ................................. 48
   3.2. Rights of the data subject .......................................... 52
   3.3. Assessments ............................................................ 55
   3.4. Enforcement ........................................................... 65
4. Conclusion ................................................................. 69

Chapter III
The Challenges for and Alternatives to the Current Privacy Paradigm .......... 71
1. Introduction ................................................................. 71
2. The challenges Big Data poses to the current legal paradigm ................... 71
   2.1. Big Data and Data Protection ...................................... 72
   2.2. Focus on the individual ............................................. 75
   2.3. Regulation through legal means ................................... 76
3. How the ECtHR is gradually moving beyond the individualized privacy paradigm .................................................. 81
   3.1. Reasonable likelihood (hypothetical harm) ....................... 82
   3.2. Chilling effect (future harm) ...................................... 85
   3.3. In abstracto claims (no individual harm) ....................... 88
   3.4. Conventionality ....................................................... 92
4. Alternatives for the current privacy paradigm in the scholarly literature .... 96
   4.1. Constitutive interests ............................................... 97
   4.2. Group and collective interests ................................... 99
Privacy as Virtue

4.3. Potential harm ......................................................... 101
4.4. Agent-based theories ............................................. 103
5. Analysis ................................................................. 105

Chapter IV
Developing an Alternative Privacy Paradigm through Virtue Ethics .......... 107
1. Introduction ............................................................ 107
2. Virtue ethics and legal regulation .................................. 108
   2.1. Virtue ethics ......................................................... 108
   2.2. Virtue ethical approach to the legal realm .................. 114
   2.3. Building blocks for an alternative privacy paradigm .... 127
3. Counterarguments against adopting a virtue ethical approach to privacy .. 129
   3.1. The correlation of rights and duties .......................... 130
   3.2. Is-ought fallacy ................................................... 135
   3.3. Action guidance ................................................... 140
4. Conclusion ............................................................... 143

Chapter V
Embedding a Virtue-based Approach in Privacy Regulation ..................... 145
1. Introduction ............................................................ 145
2. Minimum requirements ................................................ 147
   2.1. Regulating ‘data’ .................................................... 148
   2.2. Applying the rule of law test in abstracto ................. 156
   2.3. Regulating the analysis phase ................................ 160
3. Aspirations .............................................................. 167
   3.1. The limits of aspirations overriding privacy interests ... 168
   3.2. Aspirations directed at promoting human freedom .... 172
   3.3. How to embed aspirations in a juridical framework .... 177
4. Analysis ................................................................. 181

Chapter VI
Conclusion ................................................................. 187
1. Main argument ......................................................... 187
2. Outline of this book .................................................. 192
3. Conclusions ............................................................ 196
4. Theses ................................................................. 199
5. Nederlandse samenvatting ........................................... 200

Bibliography ............................................................... 203