

Eric: So today we have a longer episode with Dr. Jennifer Cobb and Dr. Heleen Janssen from the Universities of Manchester and Amsterdam. It's probably one of the more philosophical episodes that contemplates law in the face of rapidly changing technologies and changing interdependencies among people. Emerging technologies like cloud computing and encryption,

Covid, the reemergence of The Cold War has all been massive catalyst for change that everyone has witnessed in their lives. If you take a step back, you will see that your own web of interdependencies has probably changed and societies as well. And if you take a moment to reflect on that, you will start to see the importance of that construct for interpreting what the law is, where should strive to achieve the law.

Isn't merely statute. It is a complex web of interdependencies, constantly evolving. Although discussion here relates to GDPR and privacy specifically, it applies more broadly to any emerging technologies, including of course, the laws that touch encryption to really develop the right mindset about how to approach a rapidly changing world with shifting interdependencies and technologies.

You really need to take a step back. Perhaps the figuration perspective of law discussed in this episode and policy is the right place to start. If you enjoyed this episode, please share it. And now I bring you Dr. Jennifer Cobb and Heleen Janssen.

Welcome to The Encrypted Economy, a weekly podcast featuring discussions exploring the business laws, regulation, security, and technologies relating to digital assets and data. I am Eric Hess, founder of Hess Legal Counsel. I've spent decades representing regulated exchanges, broker dealers, investment advisors, and all matter of FinTech companies for all things touching electronic trading with a focus on new and developing technologies.

On today's episode, I'm so excited to introduce Heleen Janssen and Jennifer Cobbe. Onto the podcast. They are both senior researchers and lecturers at the University of Cambridge. Heleen is also a researcher at University of Amsterdam. They focus on privacy computation law, computer and technology, a lot of topics, a lot of expertise to draw from, and I'm really excited to get into this episode with both of them today. They both written a number of papers collectively, which they'll cross-reference throughout the podcast, but we'll also drop in into the show notes for people to check out independently. So welcome.

So typically we start off with a little bit of background on each of you and what sort of made you particularly interested, or that personal experience that, that made you very interested in the privacy and, and even maybe even the legal component of it in the relationship. Maybe we'll start with Jennifer and then, and then Heleen.

Jennifer: Sure. Yeah. So I think for me, it was really, I was coming out of my undergraduate law degree and I was thinking about, w what is it about law and is, what is like the concept

of loan area though, but I've been studying that, but I'm particularly interested in, and not long afterwards what I was doing, my master's degree, which was on, excuse me, that's not, I, when was doing my master's degree, which is the law of questions on governance and these kind of bigger picture questions by law, the Edward Snowden revelations, but the NSA's a GCHQ surveillance practices came on.

And I started being interested in surveillance questions at par. And I'm that kind of thing that coming from surveillance for quite a while. And I've written some of my undergraduate and master's degree essays and not dissertations of these camps. Whenever this stuff came, I, that was when I thought, oh, I'm, this is really interesting.

So I got into the kind of state circular it's question the question of, what kind of bars to see is how district feel the internet and what are they doing on the internet and what should we be concerned about? I'm not very quickly. sister billing, all of us on the internet and what other things are happening.

And of course all the privacy data protection questions that come up from all the platforms that we use at the game and all of those different things. So from there, it snowballed into what I work on language, which is much broader than just those quite narrow turbulence issues.

But that's sort of nine, 10 years ago. So it's taking nine to 10 years. They're going to get to the point where I'm like, but I think it's been a fun journey, or I say fun journey. It's been a slightly terrifying journey somewhere along the way. As things have gone be getting progressively worse, but I'm still relatively optimistic about getting them push things towards a better direction.

Eric: Optimism is good.

Jennifer: Yeah. Thanks.

Heleen: I have a long standing career at ministry of interior in the Netherlands where I was working at the constitutional affairs and legislation department. So yeah, I have experienced with lawmaking, but also with, to making in many areas. My background is in constitutional law or let's say public law, but during my work as a ministry, actually many other areas of law are coming by.

And as of 2006 the ministries, or did the government have more and more interested in using technologies? They weren't holes and new technologies at the time, but thought upcoming. I very swiftly. And as of that moment, I got very interested and try to focus in my work on this area and how it relates to the law and how the law should respond to issues.

That's come with technologies. Just to give you an example I've been working on oh, sorry. I worked on constitutional legislation. So I led the project on the modernization of the roasting communication secrecy. Another thing you're there, for instance, instead I internationally and negotiated the revision of the council of Europe's convention of data protection.

I did that on behalf of. Another area of law was where I negotiated for equal treatment. A directive. There are many of those, but the one I was working on at the time was equal treatment of many women where they access, and supply goods and services are concerned. Very exciting time. That was and I also contributed to Dutch intelligence and services.

Yeah, that was also a very exciting time and not always easy because you're very many splits. And between, so you ha I have my own background from a constitutional, fundamental life fundamental rights perspective. At the same time you see that powers are going elsewhere.

So yeah you questioned sometimes what does the work I'm doing here? It doesn't make sense to be honest, that was sometimes challenging, but yeah, as a person you might sometimes feel torn apart between two worlds. Yeah. And then at some point I really long back to dare to academia again, and that is where I started to work at a time with Jennifer and it wasn't 2018 with the university of Cambridge.

I'm still connected to the university, but I also go back to the Netherlands where I start working at university of Amsterdam. And mainly my focus is on questions of data governance at the moment issue of power and control. I have been working on focusing pretty much on decentralized modes of data processing thereby focusing on personal data and on data intermediaries at the minutes where I focused within the Cambridge circle on the technical side of things.

And in Amsterdam, I looked more at the practicality of things. So I think.

Eric: We're going to start off taking sort of a step back and maybe more of a you know, philosophical and sort of policy-driven approach. Jennifer Cobb wrote a paper or is writing; I should say a paper on a figurative or figuration analysis and its application to law.

Both Heleen and Jennifer have worked a lot with these concepts. But to lay, to set the stage, could you introduce the concept of figuration and its application to law, and I guess social economic, political policy settings as well?

Jennifer: Yeah, sure. So bigger regions are a concept that was put forward by the German sociologist, Norbert Elias, and they well over the course of his career from the thirties through the seventies, his basic argument is.

All the people everywhere all the time throughout history have been involved in essentially a huge number of interdependencies with other people. These interdependencies come from the idea that people can't really exist in the world of their own. He only exists in the world in relation to other people.

By that no one person can be born completely alone, and I go through their life on their own and then die alone. At some point you have to rely on other people. Nobody can perform all of the things that they need to do themselves to be able to survive. So he's so Norbert Elias says that we each perform functions for each other by which he means we HD the things that we each other need to survive and thrive in society.

And these functions produce interdependencies between people, and everybody is in these, as he says, these fluctuating, where to spend their dependents, because it's also very big on the idea that everything is. There's very little in the world that is ever static. Everything is constantly changing. So these figurations that are formed through these webs of interdependence are constantly changing.

They're extremely dynamic and fluctuating, or they all come with these balances apart, the operating within and across and three, these figurations. So part in his view comes from the fact that we have to each before these functions for each other. So if you're interdependent, if you're dependent on one person, then they possibly have some kind of relationship with you, but which they can provide these kinds of these functions.

So that's this basic idea. It's all about relations between people functions before by people it's all up like these webs. So what he says is that if we want to understand human society, and if we want to understand why people exist about society, then we need to understand these figurations.

And I think that's a pretty powerful argument because I think it's essential. It's essential observations about the nature of human existence. What does that tell us if by law? That's already the question. What it tells us by law is that much of our current approach to law, which is based in the idea that there are great individual people that can be easily distinguished from others.

I think the figurations analysis tells us that that's based on incorrect assumption. I think it tells us that actually, if we want to be able to understand why people act on why people act, how the law can intervene, then we need to have a bigger, rational understanding of their relations.

Ultimately, the law is in large part by governing people's relations, or at least by trying to govern them through nations. So if you want to try to cover them, then we need to understand them in a sophisticated way. And for me, I think figurations offers that sophisticated approach that allows us to put those relations in a broader context, but it

also allows us to understand that law isn't the only thing that covers relations. Isn't the only thing that constructs you're figuring out. Because law exists as part of the sort of ever-changing wide-ranging social processes. These locating web through dependencies figurations laws will be one influence among many. So we need to understand the introduction of law on the introduction of law restrictions

it wants to, or is trying to regulate recovered a little bit of other processes, including technological processes, social processes, political economic processes. We still think under sound law, but considering it and isolation just as we come from their sound individuals and their role in society of their relations.

by looking at them in isolation.

Eric: And in the context of a society or that's moving toward online ecosystems, more where a lot more of those interactions are governed into virtual space or even through automated processes, whether it's payment mechanisms or effectuation of contracts.

Does that is that increase the issues with a sort of a static perspective of law? Does it not have an impact at all? How does the greater web of online interactions factor into a figuration analysis?

Jennifer: But that's a great question. I think one of the things that is under appreciated or perhaps needs to be considered when we're talking about these.

Is that technology itself can foster forms of interdependence between people? I can alter the forms of interdependence, the P people. I can lead some people to perform other functions for others that they might not necessarily performing before I can afford different kinds of structure to figurations.

So we talk about technological processes, like moving into the kinds of things that you were talking about. And I would also say, for example, the shift into things like color platforms I'm the kind of forms of centralization that we solve with that as that, as a kind of contrast to the kind of de-centralization that we're beginning to see in some other areas.

I think what we see is that different, those different technologies that foster different forms of figuration different forms of relation with different forms of interdependence between various people, whether it's the individual users of platforms or people who are engaging in these kinds of contracts or whatever else, or whether it's the platform companies or people who are trying to develop these centralized protocols.

Those kinds of different technologies and the way that they've done that they've contributed the structure and figurations of change rapidly in the last 10 to 15 years. And the way that the law has been set up to has not my concept for this, but I was still trying to

deal with trying to survive, trying to govern these figurations, or trying to structure these figurations.

And why is that? Art could be made sense 15, 20, 25 to 30 years ago, but it didn't make sense for the time we got to the possibly centralized kind of web of the last 10 years and perhaps even less sense as we get into perhaps a slightly different way of doing things in the future.. So if we want to be able to have laws that can properly regulate and govern the kind of relations and interdependencies and figurations that we'll see emerging in these technological ecosystems in future, that we need to rethink the fundamentals of these laws really very seriously.

And also how we understand how these figurations work of what the best way to go about construction of these figurations and interdependencies might be.

Eric: And I guess a love to get your thoughts on this Heleen, as well. There's a static approach to law tend toward a more of a top-down approach? Is that one of the reasons why different models of contemplating interdependencies becomes more important?

Jennifer: I think possibly, yeah. I think there's this sort of traditional legal give of laws that you have a, you have a legal tax or legal framework that is passed by a legislature on its interpreted by a court and that's that law that's roughly beginning and ends up. Of course are much broader kind of understanding of law

Coming from things like critical legal studies or in the, yes, they have the legal realism. Or sort of social legal kind of approaches. But I would say that actually law is never static. It's never a text or even a text as interpreted lots of process that the game has with people deciding that they need to try to cover it and relations in some way, or even before that some kind of group sessions that produce a set of relations that people had decided that they need to try to intervene on in some way.

And laws are paths on interpreted and applied and contested in constantly changing circumstances and constantly changing context and constantly changing ways. So although you might have a legal text, it seems to be relatively fixed in some sense, our understandings of it, or interpretations of it, or applications of it.

And the way that it's contested changes constantly all the time laws constantly in flux in just the same way as anything else. I think it's really important to understand that law is not done in legislators and courts lost on three our society and it's not just formal legal texts. It's also the norms and the ways that we together try to regulate our relations with each other and govern our behavior.

A company like Facebook, looking at data protection law on the side of the he can comply or as might be the case of Facebook, not compliant with it. They're doing law just as much as the people who passed GDPR in the first place are doing law because laws a living thing

that flows throughout society structures figuration everywhere at all times, but it's a very imperfect process.

All of these other processes, the technological processes, the social processes, the political economic processes, they're equally at the same time, structuring moves figurations. So law has these infinite and infinitely complex directions. All of these other things happening at once on it's this broad process of law, and it's interacting with all of these other things that I think we need to investigate very simply.

And begin to understand if we want to have laws that can possibly hope to contend with the state of technology today, let alone the state of technology and future.

Eric: And as it relates to balances of power, I know that a, a part of the figuration analysis and legal artifacts. Do you want to discuss the role of balance of power in a figuration analysis?

Jennifer: Yeah, so part it's pars fundamental human invitations, and it's not just the sort of Northern Elias, like figurations give you that.

We say that it's essentially the whole of social sciences has been making that argument for the last century. I think that's something that's really still underappreciated in law. It's the word critical Kennedy's in law the worst. So she will they go be some law really grasp this idea that, excuse me, that law is.

Law as a process is a manifestation of art and all these other processes or parts regarding society and laws interpretation and its application, and all those are the things I talked about are just as much of obsessive heart as anything else, but parts of the metal of figurations, because power is ultimately what determines how these figurations function in practice.

It's the functions that we perform for each other, critiques, your dependencies, and interdependencies, but she's follow-ups as afar. And that's what really controls and governs relations. And those balances of power can come from the law. It can come from other kinds of ways that we have of reading each other and they can come from political, economic factors, technological factors, social factors, really anything else, but part of the fundamental sort of constitutive elements of all human relations.

Law is perhaps the most obvious and the most socially acknowledged form of that part or manifestation of thought part, but something about the laws, it's the core, it's the core unit. So whenever we talk about law and we talk about figurations, you can write a law and you can pass them law, and you can anticipate that it might be able to do one thing or another, but it will be those things. If the power balances that underpin the other things don't match up with what the law is trying to do, there's very little point that legislating for something. If there's no part of that, can, that can allow that to happen or permit that thing

to happen, or do you think will happen that all can say what it likes and something else is going to happen?

I'm not something that, again, I think it's underappreciated when it comes to law, that also becomes a society in general, the fundamental importance of part.

Heleen: Yeah, I really the approach taken the holistic approach, which is so necessary in this discussion. And just to also add a position that I often brought in from a legislative perspective when I was working for the government it's of course we heard those ideas that people were complaining law is so shallow.

It doesn't moderate with the modern technologies, all those kinds of complaints, very well known, but at the same time as Jennifer rightly said, law is in the middle of things. And that's what I used to say. No, isn't static at all. It is constantly anti-icing people and forcing people to go into a dialogue with each other.

Law is never finished. Indeed. Even when you have the highest courts in your country or in a regional system saying, this is how the law should be interpreted. There should, yeah, there still is space for a legislator to enter into a debate with society with also with the court.

And that is what's what should happen. Yeah. And then on the other point where a law is seen as yeah, it dominates a sort of structure law isn't over and on top of people and often societies, it is right in the middle, in between and amongst people in society and institutions. So yeah, I, I do very, I agree very much with what has been said.

Eric: And when we talk about bounce of power and I'm thinking in terms both privacy and digital asset regulation, and honestly it probably applies to regulation impacting any new technologies that the law hasn't fully caught up with, is the notion that with the balance of power and a figuration analysis that initially the balances of power can change dramatically.

As society begins to adapt, there's a new influx of technology vendors, a reaction to it by regulators because, oh, we missed this. We missed that. And maybe there's a shift in that power balance until that. Now counteract some of the benefits of the technology, and then there's a readjustment meaning larger shifts and balances of power during the inception of the regulatory framework governing any new technology that over time, perhaps moderates as know, there's a consensus view reflected both in the legal system and in the non-legal social conventions.

Jennifer: I think it's, I think I would take issue with the idea that law's falling behind technology or the law as it, as a phenomenon can fall behind technology as well. I think I would say that technologies old technologies are apparently a product of their time of their place and of their context.

Even simple technologies are embedded in these much broader processes and long-term social political and economic and legal developments over, over time. I think technologies are fundamentally social. Produced, produced in societies, and using societies either adopted or set aside in societies, but part of the context that produces these technologies is low.

So technologies come structure figurations though I talked about before, but technology, some cells are products of figurations, and we know that law is a fundamental aspect of figurations as well. And if the balances upon figurations, there's no technology that can be separated from the law that operate in that context or from other influences that operate in that context on the kind of the social nature of technologies and the fact that technologies are inherently embedded and situated within the social processes.

It's something that I think is really important to understand for, if we want to talk about weather balances, APAR, and technology non-law, whether they're how they relate to each other deal with these things. So for example The ancient Egyptians invented the first steam engine. And it was essentially it'd be small turbine, but they used as a toy, um, to you know, isn't this really exciting.

They have no use whatsoever for it as something that, that there became the industrial revolution, which was, for steam engines and, for transporter for males or whatever else. So what, when it became realized that steam on the properties you've seen people use in certain ways can be harnessed in certain ways and the industrial revolution that was because the political, economic, legal social context of the time meant that there was a need for technologies that could put you, that could do what Steven could do.

Which means that the psychology themselves are not necessarily, it's not necessarily the case that technology's changed balances apart, but the balances of far also produce technologies or produces social circumstances in which technologies are developed. So it's a much more complicated, much more cyclical, much more symbiotic relationship between all of these things that is commonly assumed.

We see as well, for example, the writing, for example, we think of writings, they can really basic technology. But writing is developed in lots of places at different times in Egypt, Greece, for example, the very artists form of writing and managing Drake was in palace administration.

And it was fine for keeping records and for that kind of thing, I'm talking like, hundreds of years BC, he went when this was happening and it was written in linear B, that was the kind of alphabet. Oh, that wasn't an alphabet. Cause he syllables to write by symbol, sorry to represent the books, but whenever the bronze age, but that it Bronx, each collapse I've been in the policy system fell away of the policies disappear.

So teaching writing, there's no evidence of any writing for several hundred. Until writing in the Greek alphabet eventually reemerged or in the finished alphabet eventually reemerged several hundred years later. And that was used almost exclusively for recording poetry. So it wasn't used for the kind of writing the kind of record keeping of public administration that had been used before.

It wasn't another century. So that was, you used to like laws and it wasn't till much later than this, that it was used for commerce and the administration. So even basic technologies like writing, but we think are so fundamental of civilization, only aggregate used in certain ways when their social economic, political legal context allows them to be used or provides the need for their use.

So we can separate that from the other things that we've been talking about that we wanna talk about, do technologies change balances apart, but then the legal responses absolutely not bounce at bar parties, finger pushes technologies that of course, con themselves have an effect in changing.

These are dependencies and functions and figurations, but it's not the case that the technology. Everything comes first, if mean?

Heleen: I think the, the examples that we have seen across many countries coming up during the coconuts and pandemic with the technology or the so-called, COVID 19 apps that had to help governments to control what was happening in public space, for instance.

Yeah, we have seen that happening here in the Netherlands as well. And the expectations were very high, but many, many people in governments really forgot about the fact that well, what are you measuring and how does it play out in people's lives? So they didn't take this broader view on, um, yeah.

On the consequences that the huge of certain technology might have for people. And they didn't. In other words, consider the more holistic aspects or the social technical aspects that such a technology would bring the government was in fact saying, so here's the technology and the technology going to regulate your behavior, which is the other side of things and which we really shouldn't want.

But it's, I, at the time I was advising industry from the fundamental rights side of fundamental rights part of things, but they didn't want to listen there. Wasn't very strong Um, attitude in this. So believe that technology will solve many problems. And that is one of the dangerous where lawmakers are sometimes lagging behind because they jump on this wagon, and they think we are going to

do this way to technology.

Eric: How does a legislator or a lawmaker policymaker faced with the regulation relating to a particular technology or, or impacting a technology, how do they actually implement more of a figuration analysis or framed differently, how are they ignoring it today? In some cases?

Jennifer: That's a great question. I think one of the things that. Regulators like everybody else, or to some degree constrained by the sort of the limit of what people have decided, because I please possible, or the way of thinking of what things we decided to please possible. And collectively as a society, we live in liberal, well, not liberal in the sense of being completely open and free, but liberal consensus, liberal, philosophical tradition, societies that are individualistic societies to have, particularly with last 40 years.

But over the time for that as well have decided that actually state intervention and the economy we're in, in, in other areas of society should essentially be limited to you. To some extent managing risks. We really shouldn't have, proper introduction of these things, the same commodity risks that were brought up in business to try to keep people.

The least safe, but really it's up to them sort themselves. And if you grow up in a tradition, a liberal tradition, and we live in a liberal education where that is that it's like things are done and law reflects that law itself is, has very individualistic kind of normative foundations and ways of thinking about the world that are promoted through law schools and three people you have any kind of legal education or legal experience.

If you're working as a regulator or as a policy maker and government, then you will be thinking in that way. It's not that you're sitting on consciously thinking. We don't want to know what about these other things that influence, or these figurations are structured. Of course they wouldn't use the word figurations because that's not the thing that we'll be thinking up.

But it's just that your limit that the people of all kinds of policy makers. Tend to be constrained in their thinking by the socio political experiences and the things I've learned to say, I'll say grown up and into the world. So they're not sitting down and thinking we don't want to be doing these things.

They just, it doesn't occur to them that they should be thinking of it. These things it's not that they're ignoring figurations is that they probably don't even deal with that way of thinking about the world exists. And they don't know that potentially law could be done in a completely different way because hopefully nobody's ever come up.

So I think that's they're institutional problems, cultural problems, things like that. It's not so easy as, as high to regulators and policy makers think about these things, because I think about these things in the same way as everybody else thinks, but these things, which is deeply flawed.

Eric: And so how do we, where does it start?

Does it start with a broader discussion or are there actually? Are there more actionable things that could be done if a policy, if we were to influence policy makers to, to incorporate more of a figurative analysis or lawmakers,

Jennifer: I think that's a question for the lady she's worked in government.

She would know exactly how to go with it.

Heleen: Yeah, I think yeah,

we have to be away from that many no makers and policymakers have been subject to all this new public management thinking and I've seen very much quality policy making and that it's very saddening because pretty much it's very broad down to processes and procedures where strategic departments they have all been economized out.

Useful yeah. Areas where people were thinking with each other, where they feel meeting each other, where there was time for let's say the, the it specialist for a lawyer and a policy maker to sit together to discuss things. There was no time for that. Everything is very much, um, flat and straight.

So there is no quick solution in other words, in this area. So what I've been working on for instance is I, I tried to design a fundamental rights impact assessments. And many people might say what ha what do we have, we already have for 25 of these kinds of things. But my thing would be, it's it's a process where you put people together and enforced and discuss certain questions together.

When you do that. Yeah, these questions come up in order, but what you definitely want is that at some point the right people are on the right table and then the other half

with consensus, and it's not the only um, they all may overestimate their own importance and to may not thrive the value and the importance of other areas that need to be involved. So I think yeah, in the long run, there may be solutions that can be thought about, but there are no quick wins in this area.

Eric: The, the hope of getting a more figuration based analysis would exist with policymakers and legislatures versus the agencies that are charged or ministries that are charged with enforcing and interpreting them.

Jennifer: That's interesting. But Mike went to feed, that was the distinction between those is less important than you might imagine, because they're all part of the process of producing law and applying well, the role at law in, in study that I talked with before.

So I think it's actually a bit of a much bigger project of changing how people think of the law and changing only people think about the role that law plays in society and how it all works and how we need to think about these things. But yes, absolutely. I think if you can change how people at any involved in any aspect of that process can think about it.

Probably they go up by doing their work. How do you hope that process needs to operate? If you can calculate people to think about things in terms of the functions that we're performing for each other on the interdependencies and how you might go about structuring a law or writing a law or interpreting, or applying a law in such a way as to your property and kind to those interdependencies to produce the kind of legal, like all of legal artifacts, they're constructs of us.

So things like rights and obligations and entitlements and that kind of thing, but also something like personal data is legal artifact because it's, there's no such thing as personal data. And it's created by law us to be any information relating to you, identified or identifiable the person, that's how the model finds it.

And it's created by law in that way. So anyway, to get people to think about how we construct legal artifacts, that kind of those interdependencies, but also help create functions or produced functions between people that change. So we've given people rights and like affective rights against each other econ, to some extent go by trying to change those loops functions that aren't your dependencies, but simply do not accept the need to get up the people to see that themselves that is never going to work because the volunteer configurations are usually far beyond the ability of any one individual to properly change.

These are structural systemic problems. So what you also need is so much bigger, a bunch of bigger, broader kind of set of artifacts frameworks that together can help change those balances apart, three functions. Um, we're still stuck or are we all happy with existing? Oh, which is very much individualistic and very much anything.

It'll protect people to do jobs that they sent the copy of themselves. So it's all well and good getting people to think about function and interdependence. But until we understand that. Individual people can change big operations. You need to have a much broader, more systemic approach. That's not really going to get us anywhere.

So we need that change in thinking away from individualism. I know, way too much more specifically, I think.

Eric: And so maybe even using, I know you touched on it with the reference to personal data, but how are current regulations particularly GDPR but you can point to other jurisdictions on privacy or whatever you want.

How do they fail to properly contemplate figurations and the over individualization of data subjects?

Jennifer: That's yeah, that's pretty comes to the core of the problem with data protection law. So data protection law, the first data protection laws in the world are possibly already 1970s. I think the chairman state of past.

I'd say the production goal binding one, which was passed in 1978. I think off the top of my head, Sweden had the first national data and I think that'd be three will correct me if I'm wrong. And of course there's things like convention one week in 19. Oh, you're definitely going to get this wrong with 1981.

Is that right? 2 81. Um, um, in the growth of like European data protection law then, so this bomb treaty put the European charter of rights into court, but fundamentally a lot of the core concepts and principles of data protection laws still originate with those much earlier kind of approach to city to fictional.

So things that convention went away, which, like I said, it's from 1980. And it's very possible that those sports with data protection laws work really well for the kinds of processing architecture on the kinds of processing figurations that you saw with the pallet at the time, but they don't work well for the kind of processing architectures and kind of groups that same figurations because the functions, three dependencies on the balances part are completely different. Not just because the technological elements have changed and these degrees are structured, but also because legal developments have changed things, social developments have changed things, political, economic developments that change things.

All of these things together have helped completely change transform. They figurations that we see around theater processing today compared to what they were 30 years ago on the laws, something about the field to keep up with that in any kind of meaningful way so that all the time you did production law, GDPR will tell you that there are 33

in data for accessing relationships. One of which is the data controller. He's the actor responsible for the purposes and means of processing, which is to say data beta on highway. One of them would be a data processor, which is somebody that the data controller has said, well, you can access this data on our behalf, but they're only opting off of the instruction of the controller in principle and our kind of a very like secondary, supporting it to kind of actor compared to the more dominant controller.

And the third is data subject, which is construed in law to be of one individual person individual person on their own. In principle that made sense back 30 years ago, when a lot of protesting might have been like the personnel records on the controller, it might've

been your employer on the date of subject, but it'd be new employee that was thought with that kind of work for that kind of scenario.

But now you might have things like really complex cloud processing services, like think of like artificial intelligence services or the purchaser of. That it's been assessing right throughout the service is somebody like the people were opposite. Some ginormous, exceptionally powerful, exceptionally wealthy, exceptionally capable multinational company.

He has all of the technical expertise. Their customer, you might be some rounded person, who runs a very small business without any technical expertise in that scenario. In most cases, in many cases, at least I would say Google or Microsoft is going to be the data processor, the very supportive kind of party in that relationship.

And actually some this round depression, he doesn't really do anything with the processing. It's going to be the controller or the Dominant person who's supposed to be in charge of all this processing on the sub-points the folks that have control over how all this is taking place that just doesn't make any sense whatsoever in that situation, quite cleanly, the dominant party, the party with.

The way that it looks functions and independence teachers set up quite Katy, the party with all the support in that scenario, it's the big multinational company you control. He actually controls the systems, not the small guy and he's using their service. So the law's completely backwards for these kinds of things.

When it comes to the individual data subjects, you've got this very serious problem in that the law fields recognize that technological consensus can create interdependencies between people. So if you think about the business models of a company like Google or Facebook, it's quite, it's not so much about the data of individual people.

It's what the data of many people aggregate it. And then interventions taking against them on the stages, me and I thought kind of thing, but data protection law, it's all, it's the obligations on individual people in terms of where all of the responsibility and individual people in terms of protecting their rights in terms of making complaints to regulators and that kind of thing, but it's still treats them as individuals, but they're not because obsessing creates so some good things.

With all, its other people who see that is similarly process and similarly analyze. And so they've been seen kind of interventions because the choices made by water. Those data subjects have effects on all of the other data subjects because they're treated actively in these business models. So because law individualizes data subjects, what it actually does in effect is it individualizes them into these kinds of these forms of capitalism.

And doesn't give them anything like the tools or mechanisms or legal avenues that they would need to actually be able to protect themselves. So that all of fundamentally fields on quite a few different fronts because it completely doesn't recognize why processing operates today has on the figurations around this.

Heleen: Yeah. Yeah, I do agree that a TPI was really set up yeah. Focusing on individuals at the same time Some initiatives or ideas coming up, and some of them may have been successful is that people have started to exercise their data rights or data, subject rights, as you can find from a QPR.

So he's got a rights. If you, as an individual, the rights to access the personal data that are being stored about you in an organization. And there have been, um, well, um, encouraged by or NGO to organizations that empower for instance workers over their rights. And some people have started to consider these days arrives maybe as well.

They are, that's the idea. And instead of a person only, um, asking access to their personal data and there definitely the certain specific goal, and this is for instance, where. At Uber drivers here in the Netherlands and UK well, they started to your case in front of the courts here in Amsterdam.

And they said, well, we have let's say OSHA. I think it was 20 to 30 drivers. That's collected exercise their data. And, um, from that they could extract how their data were comparable. And that is the elements. Jennifer just mentioned. There's so much individualized data. We all know that data at the individual level.

Isn't that interesting. It becomes interesting whenever it's analyzed on a collective basis. These people did more or less. This is what we derived from the data that we collect. And there were many more, there were other examples there as well. Yeah. They could demonstrate that they were paying inaccurate, inadequate needs, that they couldn't exercise their ordinary workers' rights.

And they said we want to be treated as workers. And that's what the courts. Yeah.

Jennifer: So

Heleen: these are maybe very teeny tiny light points future. But I do agree that the TPRS docs is very much focused on,

Jennifer: On, on that point. It's the, with the points, that data subject rights and that kind of thing, the thing with some people back, I think, those are potentially very, all right.

So it might actually find some way for you know, like organizations or groups of people. Lynn mentioned that April workers to try to see what's going on. Absolutely. I think fundamentally the problem though, is that they are essentially individualistic rights. So

you'd like to individual data subjects, and they log individual data subjects, or in principle, it's about mixed processing of their data, but those people are themselves subject to whole range of other influences.

And if your dependencies and things that make it essentially impossible in many cases, if not most cases for them to actually do that in any kind of meaningful informed kind of way, not to mention the fact that people have you know, their real lives beginning and when you shouldn't have to spend all their time trying to do this.

But for me, the fundamental problem is that three data protection law, the kind of control of processing that your theory. So it books to have through your data protection rights often we're books to time becomes somehow trying to exercise control over or to manage the data processing figurations that are composed of all of these actors, with all of their functions and interdependencies and.

The data subject is in the bathroom quality pieces going to be by far the weakest party in those figurations on some point that expected to try to monitor them themselves. I think that's completely unworkable and unrealistic, and that's the core problem. It's not so much that the kinds of companies in some circumstances, but for the most part, it's just completely unrealistic to expect.

It's more.

Eric: And so I want to introduce a concept and I want to say, it's not as we're not swaying into it because I'm not, we're not leaving the figuration analysis, but something that Heleen has worked as has written a paper on, which is personal data storage. PDSs right. That's and for those who aren't familiar with PDs is one, you it's probably more, they retention of data on a hard drive, your own personal devices.

We, we actually had a podcast recently with Polly, a data cooperative, which is built on this notion of retaining data in your own on mobile devices and then interacting with processors by permissioning. But you PDs is, and I'll also include in that category broadly data wallets.

Um, you know, in, in other words, the, whether it's in a PDs or in a data wallet, this notion of having control of your own data, this notion of choosing to interact with the parties that, that want to process that data versus necessarily turning over all rights. Now, again, if you allow them to interact with it, they may be retaining that data, but perhaps through you know, permissioning or privacy enhancing technologies, the.

The information that they get is actually limited and they can be restricted to just what they need for their purposes. Today there's this approach where there's so much data that, that these large central stores get these controllers and, and not all that data is needed.

And so it causes us huge repository and that also impacts the data subjects rights, because there's just data being collected, and aggregated versus just getting what they need, which would be managing the rights possibly better. Anyway, with that segue Heleen, do you want to talk a little bit about personal PDs is and, and how they relate to this figurative analysis, figuration analysis, not figurative?

Heleen: Yeah. Personal data stores. I think they are a great hooker to discuss this disfiguration all Angle, um, as they try to figure themselves as a new way for individuals to exercise control over their data. We have seen, interestingly, I think we have seen several initiative come up personal data stores, the idea isn't that young actually people started, people have started to think about these approaches as of 2013, 14.

So they are, they have been around for some time, like to date. We haven't seen really successful broadly spread initiatives. And I think that is a, that is one of the things to consider maybe. So why don't people and embrace those things on a broad scale? One of the things and maybe to come back again to the individualistic approach that you also see in the GDPR, you've also found that you've also find it in personal data stores.

They were very much focusing on individuals offering increase service. And one of the things maybe really overestimated is that people don't have time to interact with very many personal data stores at the same time. Okay. You can have one, but the question is very much okay. You have your personal data store.

We could also have. Couple of other apps and systems that you interact with on a daily basis and as an individual. So the question is whether personal data stores really add to people's lives, not to say that personal data stores, they also require on general levels, they require a certain expertise or knowledge over how those systems work.

So what are you um, presenting with whenever decisions asking you, do you want to this, when we want to add this service and can we use this or that data for the service or any other questions and point case in case is also that with personal information, personal data stores your personal information, as long as it's?

In your personal data store, it might be relevant. It will be relatively safe, but once it goes beyond your personal device the controllers gone. This, yeah, these are some aspects that that, that, yeah, yeah, they are systemic. You cannot work around these. It just gives to say,

Jennifer: yeah, I think PDs is, are already an interesting example of like sometimes de-centralizing the processing or de-centralizing the storage or whatever else of the data doesn't necessarily be centralized the bar or change anything else that matters in these complex kinds of environments.

So obviously a personal data store means that you're processing the data locally on device. Desensitizing that processing those and change the functions that you're performing a

little bit in the sense that you're not performing the processing for Facebook, whereas they were assessing themselves.

And that gives you some extent, some degree of control over that processing. So in principle, that makes complete sense. And through that, you can open loose interdependencies of the whole. But although you're changing those particular functions and interdependencies arising from it, but you're not really changing other functions.

And if the dependencies that arise in these complex obsessing environments and ecosystems. So for example, if I want to contact people on Facebook, I'm like my mom uses Facebook first. If I needed to come talk my mom on Facebook or through Facebook, or do whatever you can do use Facebook. So whatever you can do on Facebook, then I would probably need to use Facebook.

Or at least some other platform that that my mom uses, whatever, but probably ultimately you just see business model because this business model is extremely widespread or it could be another platform, but actually it's over by Facebook anyway, like Instagram or WhatsApp. Um, my sister-in-law for example, as well needed to be on Facebook because her daughter's school would send updates about whether it's gone with clothes, if it was a snow day or something like that, it was sent that things all feeds through things back.

So you have to be on Facebook if you to know what's going on. So the fundamental problem, I think with personal get source, it's the psychological elements of these things are just one of the various things that influence figurations. And actually there are a whole lot of other things as well.

The hub structure figurations and structured balances in, in those segments. So choices over data are often severely limited by social applicant or political economic realities. A personal data source doesn't necessarily, or really as a whole change. There are other things they might be useful as part of a much broader systemic structural kind of change.

And actually could be very useful in some circumstances, I think, but unless we have that much broader change, I'm not sure for solving the storage of any,

Eric: You certainly don't want to mandate technology cause that's you ultimately stifle the next phase of innovation. So we talked a little bit about how the individually focused model D incentivizes the assertion of protections.

How, how do we move toward what is the model where you're not as an individual required to assert your rights? Cause I agree. All these rights of the individual, we'll get into that a little bit later. Any single individual really may not be motivated or incentivized to assert those protections.

That they really just want it done for them. They have X number of minutes a day to devote to this. If that it's like cybersecurity, you don't want to worry about cybersecurity. You have to worry about cybersecurity. It's good for you to worry about cybersecurity. You actually may be more motivated to worry about cybersecurity than privacy, because cybersecurity can impact you with dollars and just ways and a lot of pain.

And on the other side of that, privacy can also do that. But at any rate what is the right model? We talked about, like how GDPR looks at the, um, you know, you have your data processors, you have your data controllers, you have the subjects, you have these three classes that have different rules or rights associated with them.

How does this notion of broadening the individual rights out? How does that factor into that construct or does it not?

Jennifer: So I think cyber security is actually quite a gate or interesting analogy because cybersecurity experts have, I think long ago, concluded that if your points of failure in your cyber security is if people, individuals, then your system is going to feel at some point because people are just terrible at this for a whole number of reasons that are largely beyond their control, because most people can help design where the interest or the understanding or knowledge really shouldn't have shape.

I think I said the same thing with data protection. We make a lot of data protection enforcement on the oversights. We've got dependent on individual data subjects, acting responsibly, managing their data and all that kind of thing. And when we make a key point to failure at the individual person, then protections will feel it's guaranteed.

It's. I think people shouldn't have to sit and manage their data protection much in the same way as they should in the, to cybersecurity. The average person in the street is simply never going to do it. And it's unrealistic to put those obligations on them. When we do that, you're just victimizing people.

And I think if you've got lots of folks, nothing exists in principle for the protection of people as a theater production. Does the whole point, the data connection isn't about protecting data? It's about protecting people from interferences, with they're pumped about the rights calls, but the processing of personal data relating to them.

And if we're going to have a legal framework, that's constructed with the purpose of protecting people, then we count in that in doing so corporate victimizing people putting them in positions where they're simply incapable of being protected. I think that's a completely wrong approach. But unfortunately it's secrets at the law because it hasn't been updated properly like a written branch from growing up principles forward updates in 30 years, which is what the.

So what can we do to try to end up like this? I think first of all, we'll have to make sure that there is an understanding of the fact that actually data subject rights within subject mechanisms and actually be important and useful. So things that the right of access to personal data is an important and useful, but it should be completely decoupled from the oversight on enforcement, against, um, against data controllers who are acting awfully, nothing should depend on the subjects being these kinds of engaged, active citizens going about, in a responsible way, because that's not reality.

Of course people should be able to lodge complaints if they won't do, but actually we need to really dig up all these things to the large extent. I think we need to understand, we need the law to understand that it doesn't make sense to talk about an individual data subject in many kinds of contexts, but it might be the case that in some contexts it's always makes sense to talk about individual data subjects.

That's fine. But in other contexts. It's awesome. So I think what we need actually afford to data protection laws that are more particularized to particular sectors or particular kinds of processing, we're actually a more collective approach might be better in some than others. The kind of one size fits all data protection law, which is kind of GDPR has moved away from to some degree, but it's still the core logic is that's not what you see the ball anymore.

We have processing architectures and process and figurations that are completely different from others and applying one set of laws to do things doesn't work. So we need to have within the ones that I think we need to feature, we need to recognize that the data controller, the data processor set the rules.

We have that work for a lot of things. We need to fundamentally rethink how that works. But in terms of individuals, we need to start cutting people's classes of any collected mechanisms for protection of people. There are other ways in which other areas. So protecting people cut the base. So example like health and safety glasses, some kind of collective protections where environment below collective productions is.

We need to be looking towards soaks for inspiration in psychological.

Heleen: Yeah. I've been looking into approaches where mechanism, it's not mechanisms where entities, I should say for, they call themselves data trusts or data comments. Yeah, there are proposals underway where those entities or people developing those.

So they are, they are not there yet, but they are being developed in in, in scholarly environments, particularly in UK. I stopped. You have well, you can broadly say a data intermediary or such a data trust where you have an organization that is taking care of your rights on your behalf in some way, I think one of the questions that these, whether you liked him or not, or whether you would accept him or not as representing you visa fee

data controllers needing that discussion aside, but they are pretty strong, much struggling with the question of whether the GDPR would allow such a, such an organization to exercise your rights your data rights on your behalf.

And that's also something that we are looking into in in Amsterdam. But yeah, so assuming out again the question, whether such that would mean there is an organization that would exercise your rights on your behalf. Um, yeah, you're going to be very critical about each at the same time, because once such an organization is exercising your data right in your behalf with a lot of other people's rights and they are, so they are more, generally more people involved to such a data trust.

Now the question then arises. Would you trust such a data trust to exercise those rights on your behalf? So yeah, I think there are very many things to consider, but this is one of the ways forward that is currently yeah. Being looked at in scientific, in academic circles.

Jennifer: I think in terms of things that collect different actions; a Lotus of law is very procedural in nature.

It's all a fight. You know, how your processors doing things or her control or sorry, doing things on, are they, risk management or are they, take taking steps to mitigate potential problems? Which is you know, starting much part of the course reputation in, in, in our particular context.

I'm actually in, in the world in general at minute. I think what we need, and to some extent, artist, much more substantive productions, we need to say, actually, you shouldn't be allowed to do these things. Oh, we should have certain things that are just prohibited activities with personal data.

That would be the collective protection because we'll protect everybody equally, regardless of what it is there, regardless of how well they engage with X rights or whatever else. And I think mechanisms are overseeing and enforcing those kinds of substantive hard protections would go a long way towards solving a lot of the problems or at least some of the problems that we've seen with processing today.

Although we should also acknowledge it. I think that when it comes to data production at the minute, one of the problems is that too many theaters are extremely. Or extremely under-resourced or to something that would really interest and actually enforcing the law. Some of them in particular in Ireland and the UK are exceptionally ineffective.

Some of them were slightly better. France is one, the CNL is a little bit better, but we can out of the particular absolutely terrible as regulators, they seem to completely misunderstand what it is. They should actually be digging and seem to have very little interest in applying the law, rather than just helping tech companies figure out how to deal with any sort of feeding in the binds at the well, which is not ready to deal with.

So I think bills need mechanisms to make sure the regulators actually do their job properly, whether that's allowing data subjects to take enforcement action against regulators through the courts, either individually or as groups to force them to uphold the law, or whether it's in the EU, for example, having mechanisms or better mechanisms for the European commission to bring in, for instance, proceedings against member states, I haven't resourced 13 regulators properly, or haven't made them enforce the law properly, but ways of making creating other forms of interdependence within these, all of these various factors that might strengthen the position of the subjects by protecting the better, but also might strengthen the ability of protection regulators to actually intervene by this.

Eric: Yeah. You raise a few interesting points there. And then not to say everything else wasn't interesting, but the, the, the enforcement is an issue even with all the laws in place. Enforcement's an issue and you know, there are organizations like NOI who are very active in, in doing, in, in keeping the regulators honest, but you know what a job they have.

Huh? And so there's not many organizations quite like NOI that are out there, doing things like that. Champion championing the the rights of the individual data subjects. That's, that's, that's one. And then the other thing that's really interesting and perhaps is a risk that develops over time is the notion of regulatory capture.

If you're you know, a regulator for privacy you're going to have been able to score a well-paying jobs in the large tech companies that are the ones who are most active in trying to comply. And it creates a sort of revolving door where, you know, that experience is valid in the agency, but also that experience in the agency is also valued even more in the private sector and it, it encourages, we have that a lot in, in the regulation of pharmaceuticals and a lot in the regulation of financial services.

It's just, it's, across the board, whenever you have big industries being regulated by. Regulators over time, that's going to create it. That's going to you know, result in some inherent biases within the system, because it's not that people are out there actively conspiring.

It's just that they naturally gravitate toward that framework of understanding things in the context of we're the big players and it creates, and the other component of that. And we're actually going to talk about that. Actually, maybe it's a good segue is it creates moats protections for the big players.

Smaller incumbents have a barrier of entry into entering into, highly regulated markets, because they have to address these regulations right out the gate. And maybe we'll talk a bit about You know this in the context of technology startups who are struggling with this as well, you both worked on I think two papers and a study relating to this and I'll leave it to one of you to, to introduce the paper and what it was endeavoring to achieve in this study.

I don't know if Heleen or.

Yeah.

Heleen: Um, we interviewed the first author was Chris Norvell. He interviewed I think 15 companies startup companies in how they went about the GDPR, what it meant for them, what it entails for them to be compliant and whether they think they can be compliant. And these interviews were taken right before the time or a little bit after the time are entered into for, so it was a lot of uncertainty for those tech startups and.

Yeah, what we saw very much emerging in those interviews that people didn't really have an idea and they sat this is a risk-based regulation. So who are we to do to substantiate to this? And how are we, who are we to give substance to our own actions and, and decisions. So it was very difficult for them.

Um, and but it doesn't mean that you as a star, as a startup, you can say I don't know, and I don't care. And I, I cannot take this responsibility. So once you enter this market where you want to, where you want to process personal data, you have to deal with it. And, and at the same time what we saw was that, okay, they may not have the knowledge, but they still have to abide by the rules.

Is that these tech startups? Oh today, they can be the big players of tomorrow. And so what we saw w what we thought was, would be very good approach that yeah particularly recognized this seriously, considered it and help them. There are tech startups in become a compliant, or maybe saying the big, big companies may perhaps consider how to help those have with a bigger purse to comply with the GDPR, how to help those tech startups.

Um, yeah, that was an exciting paper and yeah, many,

Jennifer: Startups are often, I think I under considered a topic for data protection discussions. That's something I said before, it's not lost on three through society, by people interpreting it and applying it and contesting it, and I'm trying to navigate their obligations and trying to comply with it.

So both startups are doing data protection law, just as much as anybody else in, in that kind of law process that do data protection model. So I think they're just as important as kind of areas of inquiry for us as academics, trying to understand data protection law, and trying to understand how that all works right there in the real world, rather than of like, in our textbooks are heavy on our articles.

And then those things are really important to understand how do people actually go home in the real world? What is their understanding of the law? How does the obligations that apply to them and of how they should quote by trying to comply with it? And what we find with it with the startups was that a lot of people were really keen to comply with it all.

Quite a few of the people that we, that were interviewed really agreed with data protection, or they really thought that it was an important thing to protect. But just had no idea where to begin because it's based on it's being this kind of overwhelmingly complex thing that they would have no real way of, of the I think that speaks to a lot of misconceptions of what data protection law for quite some time, because actually the court obligations, data protection law is not particularly complicated.

I have been the law for, at this point 25 years. So people who are coming into this space shoot, ideally you have some kind of expertise or understanding of what the law says. But these people just have no idea. They find it so complex and so overwhelming that they just retreated from it.

And that's a major problem for law, because like I say, people are doing law. The startups are doing well. And if Indian law they're just not compliant with it or not applying with the shade. And that means a lot, it doesn't exist or isn't effective in the way that it should be in relation to their products and services.

And then also ultimately needs of the people who are using their products and services are somebody's not going to be protected the way they should be. And that's a massive problem. I think a lot of it has to be on people like the ICO or organizations like industry bodies who have the expertise to try to help startups understand what their obligations are.

Eric: And how does ICO stand for

Jennifer: the information commissioner's office, which is the UK, the protection to help, to help these the startup companies understand what their obligations are not complying with them, because until we have this more proactive approach to making sure that data protection is. The law says that everybody should be implementing data protection principles from the ground up and systems design, but we know that doesn't happen.

Have a thought the more proactive approach to try to make sure that happens, people are going to be protected and that's not really good one.

Eric: And so from a tech startups perspective you know, D I read the study and I saw a lot of issues that were raised by the tech startups. Some wanted more prescription.

There was to your point, there was confusion about, Hey, what do we do? How do we do it? Of course, if you are prescriptive, then it raises a whole bunch of other situ issues because they don't always apply. It makes interpretation difficult. Then, that can worsen the situation. You know, given that tech startups they're starved for resources probably fundamentally they just don't want to have to worry about it right now.

Like any startup you know, they want to focus on how they actually succeed and get traction versus comply with regulations. How do we address that? Because, even if you say we'll take this cohort and we'll make sure that they talk to the ICO and et cetera, I'm not saying, there's always, it's always coming in, there's always new tech startups. There are always new technologies, new things are being challenged with how you do, the smaller set of companies versus the bigger ones where their tool they'll have a data protection officer in-house or a data privacy officer in house. What, what is w what is a solution.

Jennifer: Like legal directory and regulatory compliance is a kind of requirement. It's a non-optional requirement. Not just in tech, but also, in, in virtually any sector of the economy, one of the most fundamental things that companies need to do as a deed, everybody else needs today is complying with the law because the rule of law is, is one of the fundamentals of which like, democratic free society is based on.

So we need companies to comply with the law. And if a company is going into business with the resources to comply with the law, or with the interest in complying with the law, that they shouldn't be going into business it's simple as that. I think they need to come back when they can afford it, or if you have interest in doing it and do it properly, it's quite a hard line kind of approach, I think.

The real of those fundamentals, like the free society. So let's make sure we pull back over the interest of, tech people in starting their startup. I'm doing whatever.

Eric: And, and, and maybe there's also a role to introduce these tech, these companies to technologies early on that would allow them, where they could just basically design around some of the limitations of the law might impose specifically privacy enhancing technologies or encryption.

If you can, you know, I I've talked on this podcast many times before, um, that that data is you know, personal data is like plutonium, it's, it's, it's radioactive, it's toxic. It's something that, you know, as a company you're incentivized not to have more than you need. It doesn't mean that you actually adhere to those incentives.

It doesn't mean that you develop infrastructures, that, that solidify your structure where you're centralizing it. Cause you found a way to comply, but yet you still have all the data. No. Do you think that has a place of like, maybe like the ICO doing more to say, here are some solutions you can utilize our solutions like them to facilitate compliance and you should be building it by, at the outset

Jennifer: to some extent.

Yeah. So things like privacy enhancing technologies might be useful for some businesses. Though I would be wary of the idea of companies using privacy enhancing technologies to get around the limitations of law, because very often the limitations are there for a good

reason on if you try to get it wrong then there's a good chance that you might get away with it.

Of course, because you have data protection, regulators are pretty useless, but there's a good chance that you could find yourself in kind of hot water because you've got tried to get ignored the fact that there's a reason why that limit exists. I, you can find yourself in more trouble, but also because of the need to protect individuals and the people on the societies at the other side of these psychologies are the people impacted by these technologies.

Again, there's limitations, success for a reason, and it's usually for that protection. So yes, absolutely. If you can do things in defiance of the law and use privacy enhancing technologies in a way that protects and getting your users or people affected the best systems while also making it easier for you to comply with the law, then fantastic do that.

And actually you should encourage people to do that. And industry bodies and regulators and anybody else relevant. She can coach people to do that, but it'd be much more hesitant, but Debbie of using privacy enhancing technologies to get around the law. I think that way it's a dangerous route to go down.

Heleen: Maybe try to think of different models of how you organize a regulatory outside.

That might be a way to go.

Eric: Right. And

you actually, in your paper, you had a I liked your chart by the way, your infographic with, the solutions and the stakeholders and all the different possibilities. I also noted that the privacy by design emphasis was like the top left.

And I think Jennifer, I think to a large extent, you're saying like privacy by design means you start off by designing, factoring this in. And maybe there are tools, um, you know, a privacy impact assessment that could assist you with that as well. How would you envision this?

the collective rights of the individuals being better accounted for in, in privacy regulation. I'll, I'll footnote that you noted that, some things you don't even necessarily need to have the engagement of the user to do that. They should just be fundamental that, these are things you cannot do with the data in, and then you don't necessarily have to worry about the, or rely on the individual exercising those rights.

But do you have any other thoughts about just even ensuring that the collective interests are represented in the legal system versus I guess relying on, on a top down approach of saying here are things that are in the interest of the collective.

Jennifer: I think something I've; I'm quite interested in is the idea of I assume it's them and that kind of thing.

To investigate or bring proceedings against problems on behalf of people who've been affected by something. So in the UK, we have, for example what's called the part of my trade health service officer on this job. But the part of my grade health service almost been to deal with complaints from individuals about the activities and actions and policies of public bodies.

So you know, government agencies and other kind of thing. And I think an ombudsman kind of idea for taking problems that are clearly the collective nature affecting data subjects and investigating those complaints and then passing them on to the regular recommender for things that enforcement or whatever else or themselves bringing proceedings against them.

And of course you get potentially merged that kind of opens men regulator kind of function into one kind of volume that has, that is important of to act that way. But that would need quite a restructuring of the regulator, I think, but some kind of data protection. Might not necessarily be a bad idea though.

Ombudsmen have their own problems and their own limitations, but it would be an improvement over what we have. I also think strengthen rights, four things, plus class rights, class actions. GDPR has some very minimal class action rights continued today, which have been in the UK at least even more restricted by recent court judgements.

But I think actually class action rights for effective action through the courts, not necessarily for compensation because a lot of data protection harms aren't really quantifiable. But in terms of forcing data controllers to comply with the law, I think could be potentially very useful mechanisms.

But perhaps some kind of, of, of recommends for, for the subjects. But I'm not thinking of punitive, cut it out. I think it's more by forcing compliance with the law. So those kinds of collective messages. Where you can have essentially somebody leading on that on a class action, but it can encompass the sort of data privacy or data reduction, infringements of a wide range of the number of people might be a potential way forward.

But there are also other ways that we could look up from other kinds of variants to follow that I don't want to get too prescriptive about it at this point, because I think it's not clear, it's sassy with the best way to go within this would be, but certainly we help, we have things that we can learn from on things that we can do that are at least worth trying, because they would be better than what we have on

Heleen,

Eric: do you have any experience with um, you know, in, in terms of the government, like who had in the Netherlands who had responsibility for acting on behalf of the collective outside of the regulators were ensuring that the policy-making decisions and the privacy regulations were acting in the interests of not just the individual

Heleen: I recall from discussions from back then that well, people were really open to these to this, um,

Perspective, but at the same time also I'm hesitant to have, would the courts not be overburdened and that, that kind of things. Um, yeah, meanwhile there have been successful that's a collective actions.

Um, well, as I just mentioned with bookcase in Germany, there was for instance with open tufa, there was this case where an NGO asked, I think, like 4,000 people to exercise their data rights for them and to collect data and to collate the data well, to analyze it. And what's appeared from that court case from that case, or what appeared from that that exercise is that, um, credit registering um, organization in Germany, the biggest one in Germany actually.

The credit scoring organization that they will discriminatory decision. So that, again, an example where yeah, where the collective action to pinpoint this one can really be a big help. And this is where the, the organization. Yeah, they had to accept that their practices were found to be discriminatory.

And this was future application to damage for them.

Eric: Yeah. You know, there's multiple components to it. It's the, you, you know, you have, the, the fact that personal data may not be protected. You have, how it's being utilized, do you have bias and decision-making and how that impacts the data subjects or even the class of subjects.

So all those factors are. Or important consideration. We don't have any we don't have too much time left. Is there anything that, that we haven't touched on in, in this podcast that you think maybe we should sort of give more context to what we've talked about thus far?

Jennifer: I guess something I've been thinking about lately is, and this is connected to a lot of what we've been talking about so far is the role of gaps in law and allowing things to happen and preventing things up or facilitating things to happen in three that helping structure the process, and figurations already have other kinds of figurations and any kind of way.

We talked an awful lot about what the law dogs and about holidays. I had a lot, Mike does things differently, but we've talked very little about what that doesn't do and how we

might redraw those gaps or redraw those species and laws and whether we need to and what the effect that looks to look up since.

I think legal inquiry in general is exceptionally uninterested enough because people in general, working in law tend to think we need to look up the law on its effects rather than the spaces where there isn't say GDPR apply on the effects of that or the ways in which GDPR doesn't define certain things on what that kind of aspect of it might look like.

So that's something that I would encourage people to think about a bit more because I'm going to try to think about that a bit more because I think it's important and underappreciated.

Eric: Yeah. I guess we could do another podcast about what the law doesn't cover. But the enforcement of it, the enforcement of the existing laws, in many ways the law today isn't necessarily protecting the interests in the way that

it's structured, you almost have to wonder do we have to get the construct rate before we can start layering in other requirements that may fall into the similar issue. You know, perpetuating the problem. So I think the figuration analysis, I, in reading it, like I was talking to Jennifer before the podcast, it just really struck me as to how useful it would be to just think about it, in a law in a much broader context and, and, and, and that in many ways, the non-lethal components of the system are as meaningful in as a legal components.

- And all of these things work together and, and in many ways, when you start to isolate the different components, you miss the interrelation and the interdependencies of them all. This was a great discussion. Thank you both for joining the podcast. It was great to have you on .