

# Privatization of Mediation of Digital Rights Online

by  
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Merger 8: Right to be forgotten (RTBF), privacy and public access to information

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# The Basic Premise of this Contribution

- to an increasing extent the management of individuals' fundamental rights, such as privacy and the mediation of free expression, is being left in the hands of private actors
- Private actors, including the so-called Internet content intermediaries (e.g., Google, Facebook, Youtube, Instagram), and various global Internet Governance institutions, such as ICANN, do in fact govern/manage/mediate human rights via their standard contractual clauses and 'Internet architecture' (domain name system, algorithms, online content moderation, etc).
- These contracts featuring standard terms and conditions of service very often present an illusion of choice for the users/domain name registrants: they must either agree to those terms or they will not be able to use the service.
- This phenomenon has been described as 'privatization of human rights' by prominent commentators and scholars, such as, e.g, Laura DeNardis and Emily Taylor.

# *De Facto* Governance of Human Rights Online

- Private actors establish boundaries on online rights to expression and privacy in accordance with their business models.
- Where governments formerly set regulatory policies, in the digital environment, private Internet platforms currently set policies *de facto*, such as:
  - 1. the *de facto* global free speech standards implied by YouTube and Facebook's content moderation on public nudity (e.g, banned female breast).
  - 2. *Google vs Spain* case *explicitly* gave the mandate to Google to become a *de facto* watchdog for individual privacy on the Internet- by exercising the delicate balancing act between competing values (public access to information vs. individual right to privacy).
- Decisions on what is permissible are exercised *internally* by sub-contractors of Internet platforms, and the guidelines and criteria for such decisions are largely unknown to the public.
- As such, the basic tools of accountability and governance — public and legal pressure — are very limited, with private actors holding most power.

# Feedback Loop: Alignment of State & Corporate Interests

- States are attracted to big data honey pots. The trends for governments seeking data from private sector networks is relentlessly upward (e.g., Facebook or Google Transparency Reports).
- ‘As long as the governments keep demanding access (to personal data) and refrain from legislating protections, its easier to keep design systems to allow it. It’s a powerful feedback loop: the business model supports the government effort, and the government effort justifies the business model. ‘ (Schneker, 2015, p. 86).
- The current situation aligns the interests of two powerful actors: states and multinationals. This alignment poses a risk to fundamental rights of individuals and democracy. It also makes regulatory interventions to limit such data collection unlikely.
- Recent judgements from the Court of Justice of the EU reasserting fundamental rights in the online environment stand in start contrast to the lack of leadership shown by states.
- And we can discuss the situation with the fellow panellists and the audience.