Privatization of Mediation of Digital Rights Online

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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.