HUMAN RIGHTS IN THE AGE OF PLATFORMS

EDITED BY RIKKE FRANK JØRGENSEN

FOREWORD BY DAVID KAYE

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Introduction

Rikke Frank Jørgensen

This book is concerned with the human rights implications of the "social web."[1] Companies such as Google, Facebook, Apple, Microsoft, Twitter, LinkedIn, and Yahoo! play an increasingly important role as managers of services and platforms that effectively shape the norms and boundaries for how users may form and express opinions, encounter information, debate, disagree, mobilize, and retain a sense of privacy. The technical affordances, user contracts, and governing practices of these services and platforms have significant consequences for the level of human rights protection, both in terms of the opportunities they offer and the potential harm they can cause.

Whereas part of public life and discourse was also embedded in commercial structures in the pre-Internet era, the current situation is different in scope and character. The commercial press that is often referred to as the backbone of the Fourth Estate was supplemented by a broad range of civic activities and deliberations (Elkin-Koren and Weinstock Netanel 2002, vii). Moreover, in contrast to today's technology giants, the commercial press was guided by media law and relatively clear expectations as to the role of the press in society, meaning an explicit and regulated (although imperfect on many counts) role in relation to public deliberation and participation.

In contrast to this, the platforms and services that make up the social web are based on the double logic of public participation and commercial interest (Gillespie 2010). Arguably, over the past twenty years, these companies have facilitated a revolution in access to information and communication and have had a transformative impact on individuals' ability to express, assemble, mobilize, inform, learn, educate, and so on around the globe. At the same time, the ability of states to compel action by the companies has put the human rights implications of their practices increasingly

high on the international agenda (Sullivan 2016, 7). Most recently, concern has been raised as to the democratic implications of having a group of relatively few and powerful companies moderate and govern what is effectively the "the greatest expansion of access to information in history" (Kaye 2016). Despite the civic-minded narratives used to describe their services (Jørgensen 2017b; Moore 2016), the companies ultimately answer to shareholders rather than the public interest, and especially Google's and Facebook's business practices have increasingly been under scrutiny in the public debate.

The revenue model of the widely used platforms imply that the expressions, discussions, queries, searches, and controversies that make up people's social life in the online domain form part of a personal information economy (Elmer 2004). Advertising is no longer simply the dominant way to pay for information and culture (Lewis 2016), as has long been the case within "old media," but has taken on a new dimension in that an unprecedented amount of social interaction is used to control markets. Whereas data was previously "considered a byproduct" of interactions with media, major Internet companies have become "data firms," deriving their wealth from the abilities to harvest, analyze, and use personal data rather than from "user activity proper" (van Dijck and Poell 2013, 9). The data mining of personal information is paradoxical, as there is no demand or preference for it among consumers, yet it is accepted as a kind of cultural tax that allows users to avoid paying directly for the services provided (Lewis 2016, 95). Scholars have cautioned that these current practices represent a largely uncontested "new expression of power" (Zuboff 2015) that has severe impacts on human agency and on democracy more broadly, as elaborated by Zuboff in this volume. As these new practices permeate our economies, social interactions, and intimate selves, there is an urgent need for an understanding of their relationship with human rights.

Human rights are a set of legally codified norms that apply to all human beings, irrespective of national borders. International human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights of individuals or groups.[2] As such, it governs the relationship between the individual and the state, but it does not directly govern the activities of the private sector, although the state has an obligation to protect individuals against human rights harms in the realm of private parties.

In recent years there have been a variety of initiatives that provide guidance to companies to ensure compliance with human rights, most notably the Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011 (UNGPs; United Nations Human Rights Council 2011). According to these Guiding Principles, any business entity has a responsibility to respect human rights, and as part of this, to carry out human rights due diligence, which requires companies to identify, assess, address, and report on their human rights impacts. Moreover, the Guiding Principles state that businesses should be prepared to communicate how they address their human rights impacts externally, particularly when concerns are raised by or on behalf of affected stakeholders.

The commonly stated claim that human rights apply online as they do offline fails to recognize that in a domain dominated by privately owned platforms and services, individuals' ability to enjoy their human rights is closely related to whether states have decided to encode them into national regulation applicable to companies and/or the willingness of companies to undertake human rights due diligence. In Europe, for example, the former is the case with online privacy rights, which enjoy protection under the new EU General Data Protection Regulation (GDPR) irrespective of whether the data processing is carried out by a public institution or a private company.[3]

In order to address the interdisciplinary nature, scope, and complexity of these questions, the book is organized into three parts. The first is a theoretical and conceptual part that highlights areas in which datafication[4] and the social web have implications for the protection of human rights. The second is a more practice-oriented part that explores examples of platform governance and rulemaking, and the third is a legal part that discusses human rights under pressure, focusing in particular on the right to freedom of expression and privacy, but also addressing human rights and standards related to equality and nondiscrimination, participation, transparency, access to remedies, and the rule of law. The ultimate goal of the book is to contribute to a more robust system of human rights protection in a domain largely facilitated by corporate actors. While the cases and examples used are for the most part focused on a European and US context, the challenges this book addresses are global by nature as is most clearly illustrated in the chapters by Callamard and York and Zuckerman.

Before introducing the chapters in more detail, I will outline some of debates and literature that have served as inspiration for this book, most

notably discourses on the "platform society" and its democratic implications. As part of this, I will briefly introduce the broad field of "human rights and technology," as well as the human rights and business framework, in order to situate the specific conceptualization of this book and the human rights questions it is concerned with.

The Platform Society

In recent years, the notion of "platform" has become the prevailing way to describe the services and revenue model that make up the social web (Helmond 2015, 5). The defining characteristic of these platforms is not that they create objects of consumption but rather that they create the world within which such objects can exist (Lazzarato 2004, 188). In short, the platforms give us our horizons, or our sense of the possible (Langlois et al. 2009, 430). Via integrating buttons (like, tweet, etc.), the platforms expand beyond single services to the extent that the platform logic is visible and present across the entire web. The code and policies of the platform impose specific boundaries on social acts, and as such, the platform allows a certain predefined kind of social engagement (see the chapter by Flyverbom and Whelan in this volume). For example, you can like and have friends, but not a list of enemies. Further, the platforms' economic interest in gathering user data implies that one cannot study a single layer but must acknowledge the intimate relationship between the technical affordances and the underlying economic interests.

Arguably, the corporate logic, algorithms, and informational architectures of major platforms now play a central role in providing the very material means of existence of online publics. These combined elements regulate the "coming into being" of a public by imposing specific possibilities and limitations on user activity (Langlois et al. 2009, 417). Effectively, these platforms construct the conditions for public participation on the web. This key role prompts us to seek an understanding of their combined articulation of code and economic interests and how this logic defines the conditions and premises for online participation—in short, the paradox that exists between tools used to facilitate and free communication and the opacity and complexity of an architecture governed by the economies of data mining (ibid., 420). The economies of data mining redefine relations of power, not merely by selling user attention but by tapping into

"the everyday life" of users and refashioning it from within, guided by commercial norms such as the presumed value to advertisers (Langlois and Elmer 2013, 4). This power perspective has also been highlighted in recent software studies, albeit from a different perspective, focusing on the interests that algorithms afford and serve in their specific manifestation (Bucher 2012), and thus how these algorithms rule (Gillespie 2014, 168). Yet scholarship has only recently begun to struggle with the broader societal implications of having technology companies define the boundaries and conditions for online social life and a networked public sphere. In addition, there is an increasing awareness of the difficulty for researchers in studying the technical, economic, and political priorities that guide major platforms due to their largely inaccessible, "complex and black-boxed architecture" (Langlois et al. 2009, 416). While major platforms effectively influence whether the notion of a public sphere for democratic dialogue can be sustained into the future (Mansell 2015), we have limited knowledge of how they operate and limited means of holding them accountable to fundamental rights and freedoms.

From a regulatory perspective, the companies that control the major platforms for information search, social networking, and public discourse of all kinds "squeeze themselves between traditional news companies and their two customer segments, the audience and the advertisers" (Latzer et al. 2014, 18). They benefit from substantial economies of scale and a scope of operation that enables them to exploit enormous information assets (Mansell 2015, 20), while their global character detaches them from the close structural coupling between the systems of law and politics that is the paradigm of the nation-state (Graber 2016, 22). While the companies often frame themselves as neutral "conduits" for traffic and hosts for content creators, they have the power to influence which ideas are easily located and how boundaries for public discourse are set, as elaborated by York and Zuckerman in this volume. The capacity of these companies to screen out desirable content without the user's knowledge is as significant as their capacity to screen out undesirable content. "Citizens cannot choose to view what they are not aware of or to protest about the absence of content which they cannot discover" (Mansell 2015, 24). In short, the regulatory challenge does not concern only cases in which the companies exercise direct editorial control over content. At a more fundamental level, it is about whether their practices shape the user's online experience in ways that are inconsistent

with human rights standards relating to rights of expression, public participation, nondiscrimination, media plurality, privacy, and so forth. When their gatekeeping efforts diminish the quality or variety of content accessed by citizens, result in discriminatory treatment, or lead to unwanted surveillance, there is a prime facie case for policy oversight (ibid., 3). We shall return to this point below when addressing the human rights responsibilities of these companies.

Private Control, Public Values

Since Habermas' seminal work on transformations of the public sphere, various aspects of commercialization have been raised and widely elaborated in relation to the increasing power of private media corporations over public discourse, not least concerning their economic and institutional configurations (Verstraeten 2007, 78). Since public spaces relate to general principles of democracy as locations where "dissent and affirmation become visible" (Staeheli and Mitchell 2007, 1), their configurations and modalities of ownership, regulation, and governance greatly impact individuals' means of participating in online public life. Oldenburg's (1997) original work on *The Great Good Place* (or the "third place"), for example, considers the role of physical space in democratic culture and the conflict between these spaces and the commercial imperative that informs the contemporary design of cities and communities. By contrast, the commercial aspects of the online public sphere are a less researched topic although this has begun to change as scholarship increasingly examines how the political economy of online platforms affects social practices and public discourse, and what kind of public sphere may develop as a result (Gillespie 2010, 2018; Goldberg 2011; Mansell 2015).

Arguably, the major platforms of the social web have developed an incredibly successful revenue model based on collection of users' personal data, preferences, and behavior. The platforms facilitate communications within society, while also harnessing communication in an effort to monetize it (Langlois and Elmer 2013, 2). "Corporate social media platforms constantly enact these double articulations: while on the surface they seem to promote unfettered communication, they work in their back-end of data processing and analysis to transform and translate acts of communication into valuable data" (ibid., 6). Since harnessing of personal information is

at the core of this revenue model, it calls for reconsideration of both "personal" and "information" in order to adequately protect users' online privacy as discussed extensively by Mai in this volume.

On a legal level, the harnessing of personal information implies "the organized activity of exchange, supported by the legal infrastructure of private-property-plus-free-contract" (Radin 2002, 4). The value of personal information has been debated in a series of Facebook-commissioned reports on how to "sustainably maximize the contribution that personal data makes to the economy, to society, and to individuals" (Ctrl-Shift 2015, 3). It is also the topic of annual PIE (Personal Information Economy) conferences, held by Ctrl-Shift.[5] The first report explains how mass customization is enabled by information about specific things and people. "Today's practices, whether they drive the production of a coupon or a digital advertisement, employ data analysts and complex computational power to analyze data from a multitude of devices and target ads with optimal efficiency, relevance and personalization" (ibid., 9). As noted in the report, the personal information economy has given rise to a number of concerns, such as the lack of a reasonable mechanism of consent, a sense of "creepiness," fears of manipulation of algorithms, and unaccountable concentrations of data power (ibid., 15). At its core, the revenue model profiles users in order to segment customers for the purpose of targeted advertising as addressed in the chapters by Zuboff and Bermejo in this volume. A user's search activities, for example, may result in referrals to content "properties" through a variety of intermediary sharing arrangements that support targeted marketing and cross-selling (Mansell 2015, 20). The "economic turn" in Internet-related literature is also exemplified in the work of Christian Fuchs and others (Fuchs 2015; Fuchs and Sandoval 2014) who interrogate the economic logics of the social web and argue that user activity such as the production and sharing of content is exploited labor because it contributes to the production of surplus value by data-mining companies.

In the legal literature, it has been emphasized that the mantra of personalization "blurs the distinction between citizens and consumers and swaps free opinion formation for free choice of commodities" (Graber 2016, 7). Since freedom in a democratic society presupposes the "ability to have preferences formed after exposure to a sufficient amount of information" (Sunstein 2007, 45), personalization risks replacing a diverse, independent, and unpredictable public discourse with the satisfaction of private preferences,

based on previous choices (a similar concern is found in Zuckerman 2013). In addition, there are increasing concerns about the shift in decision-making power from humans to algorithms (Pasquale 2015) and the democratic implications of this shift as addressed by Bechmann in this volume. In contrast to written law, which is interpreted by authorized humans in order to take effect on a person, code is largely self-executing and implies minimal scope for interpretation (Graber 2016, 18). While this topic is receiving increasing attention (Council of Europe Committee of Experts on Internet Intermediaries 2017), there is still limited scholarship addressing the human rights and rule-of-law implications of having algorithms regulate social behavior in ways that are largely invisible and inaccessible to the individual affected.

In sum, while recognizing the more optimistic accounts of the networked public sphere and its potential for public participation (Benkler 2006; Benkler et al. 2015; Castells 2009), this book is inspired by literature that is concerned with the democratic implications of having an online domain governed by a relatively small group of powerful technology companies and informed by the personal information economy.

Human Rights and Technology Literature

Scholarship related to human rights and technology is scattered around different disciplines ranging from international law and Internet governance to media and communication studies. The interlinkage between technology and human rights started to surface on the international policy agenda during the first World Summit on the Information Society (WSIS) in 2003 and 2005 (Best, Wilson, and Maclay 2004; Jørgensen 2006). The WSIS brought together policy makers, activists, and scholars from a range of disciplines concerned with the normative foundations of the "information society." The interrelation between technology and human rights was still very new at this point, and far from obvious for anyone besides a small group of committed activists and scholars. However, in the fifteen years since WSIS a large number of books, surveys, and norm-setting documents have been produced, as we shall see below.

The human rights and technology literature includes a growing body of standard-setting literature that supports ongoing efforts to establish norms for human rights protection in the online domain. The Council of

Europe's Committee of Ministers, for example, has since 2003 issued more than 50 recommendations and declarations that apply a human rights lens to a specific area of concern in the online domain, such as search engines, social media platforms, blocking and filtering, net neutrality, Internet intermediaries, big data, Internet user rights, transborder flow of information, and so forth.[6] The Council of Europe efforts in this field are elaborated in McGonagle's chapter in this volume. Also, the Organization for Security and Co-operation in Europe (OSCE) has produced a number of guidebooks, although more narrowly related to online freedom of expression, such as *Media Freedom on the Internet: An OSCE Guidebook* (Akdeniz 2016), and the UN Human Rights Council has since 2012 adopted a number of resolutions that reaffirm the protection of human rights online.[7] Further, the UN Special Rapporteur on Freedom of Expression has produced a number of important reports that have been widely used as benchmarks for understanding and applying freedom-of-expression standards in the online domain, most recently reports on freedom of expression, states, and the private sector in the digital age (Kaye 2016), and the regulation of user-generated online content (Kaye 2018).[8] In 2015, the first UN Special Rapporteur on Privacy was appointed and contributed with work that maps out the normative baseline for protecting privacy in an online context (Cannataci 2016). Scholars and activists have also contributed to norm setting by serving to "translate" human right to an online context. One example is the Internet Rights and Principles Coalition that since 2008 has been active in promoting rights-based principles for Internet governance at the global Internet Governance Forum (IGF) as well as regional IGFs and related events. The coalition has produced a number of resources, including the Charter of Human Rights and Internet Principles for the Internet, translated into twenty-five languages. Scholarly contributions include "Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights" (Redeker, Gill, and Gasser 2018).

Another subdivision of literature is the vast number of empirically grounded studies that illustrate how technology practice and policy may pose threats to the protection of human rights. Much of the literature on rights and freedoms in the digital era has been concerned with technology-enabled means of state violations—for example, online censorship, repression, control, and surveillance. The United Nations Educational, Scientific, and Cultural Organization (UNESCO), for instance, has been very active and

contributed with dozens of reports and mappings related to the information society, such as the *Global Survey on Internet Privacy and Freedom of Expression* (Mendel et al. 2012), and the report on *Fostering Freedom Online: The Roles, Challenges and Obstacles of Internet Intermediaries* (MacKinnon et al. 2014).[9] Also, *Consent of the Networked: The Worldwide Struggle for Internet Freedom* uses a wide array of empirical examples to illustrate the current battle for freedom of expression around the globe (MacKinnon 2012). Other widely used examples include the edited volumes *Access Controlled* (Deibert et al. 2010), *Access Denied* (Deibert et al. 2008), and *Access Contested* (Deibert et al. 2011) by the OpenNet Initiative, as well as the annual *Global Information Society Watch* produced by the Association of Progressive Communication (APC) since 2007.[10] APC, especially, has broadened the discourse on human rights in the information society to include social, economic, and cultural rights, whereas the majority of works are oriented toward the right to freedom of expression and privacy. Especially from legal scholarship, numerous contributions have been made related to privacy and freedom of expression online (Agre 1994; Balkin 2014, 2018; Benedek and Kettemann 2014; Cohen 2013; Lessig 1999; Nissenbaum 2010; Solove 2008).

A subset of concerns raised in many of these works relates to the role of Internet intermediaries[11] as actors that exercise considerable control over content and services in the online domain and therefore are encouraged or enlisted to self- or coregulate. The human rights and rule-of-law implications of such practices have been raised for the past fifteen years in relation to Internet intermediaries (Angelopoulos et al. 2016; Brown 2010; Frydman and Rorive 2003; Jørgensen and Pedersen 2017; Korff 2014; Nas 2004; Tambini, Leonardi, and Marsden 2008), and the debate continues, while increasingly focusing on regulation of platforms (Belli and Zingales 2017; Laidlaw 2015; Wagner 2013). More recently, scholarship has started to interrogate the technical Internet infrastructure and standard setting from the perspective of human rights (Cath 2017; DeNardis 2014; Milan and ten Oever 2017; Rachovitsa 2017).

Taking a slightly different approach to the topic, a number of books have focused on technology as a tool for promoting human rights and social justice (Comninos 2011; Earl and Kimport 2011; Lannon and Halpin 2013; Tufekci 2017), including the Internet freedom agenda (Carr 2013; Morozov 2011; Powers and Jablonski 2015) and more recent work on data justice (Dencik, Hintz, and Cable 2016; Pasquale 2015). Ziccardi (2013), for

example, in *Resistance, Liberation Technology and Human Rights in the Digital Age*, considers the role of technology in social movements and online resistance, whereas the edited volume *New Technologies and Human Rights: Challenges to Regulation* (Cunha et al. 2013) focuses on technology and human rights from the perspective of power and inequality between the Global South and the Global North (Cunha et al. 2013). More recently, the relationship between new technologies and human rights practice is explored in the edited volume *New Technologies for Human Rights Law and Practice* by Land and Aronson (2018).

Also, scholars in fields such as media and communication studies, and information ethics, increasingly incorporate considerations of human rights norms into their work—for instance, privacy norms—although these works mostly refer to human rights in a rather general sense. Not surprisingly, media and communication scholars rarely place their analysis of, for example, transformations in the online public sphere (Balnaves and Willson 2011; Papacharissi 2010), the platform society (Gillespie 2010, 2018; van Dijck 2013), or data capitalism (Fuchs 2015; West 2017; Zuboff 2015) within the framework of the human rights system of international legal standards, institutions, and actors as a lens on these topics. However, one attempt is *Framing the Net—The Internet and Human Rights* (Jørgensen 2013), which examines how different theoretical conceptions of the online domain (as Public Sphere, Infrastructure, New Media, and Culture) carry specific human rights implications. The current volume is particularly interested in such interdisciplinary conversations, and its contributors were deliberately chosen to represent both more theoretical discourses and cutting-edge legal scholarship related to protecting human rights within the platforms and services that make up the social web.

The Human Rights Responsibility of Private Actors

In recent years, several developments have placed the role of technology companies increasingly high on the human rights agenda. First, a number of high-profile cases such as individual and class action litigation by Austrian activist Max Schrems against Facebook, the debate around fake news in relation to the US presidential election in 2016, and the Cambridge Analytica scandal have led to an increasing recognition of the powers held by a small group of technology companies and raised concern as to the

way their business practices may interfere with human rights and democratic processes. As part of this debate, some commentators have suggested that the size and market share of these companies make them de facto monopolies,[12] too powerful to serve the public interest, and called for regulation akin to that of public utilities[13] (Moore 2016; Srniceks 2017; Taplin 2017a, 2017b). In response to this, economics have argued that Google and the other technology giants do not constitute monopolies since they are far from supplying the entire market. Moreover, if companies develop into natural monopolies,[14] this only causes (economic) concern if they are not efficient in the service they supply.[15] Irrespective of whether these companies—in a technical sense—constitute monopolies, the debate points to the current difficulty in finding appropriate policy responses to the powers of the technology giants.

Second, there has been a general shift in the human rights and business discourse exemplified by the adoption of the UNGPs. The endorsement of the UNGPs by the United Nations Human Rights Council in 2011 established that businesses have a "responsibility" to respect human rights. The Guiding Principles focus on the human rights impact of any business conduct and elaborate the distinction that exists between the state duty to protect human rights and the corporate responsibility to respect human rights. In relation to the corporate responsibility, the framework iterates that companies have a responsibility to assess the way their practices, services, and products affect human rights and to mitigate negative impact. A key element of the human rights responsibility is the ability to know and show that the company is preventing and addressing any adverse human rights impacts that may be associated with its activities. As part of the ability to show, the companies are expected to communicate and provide a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders (United Nations Human Rights Council 2011, 25).

The UNGPs constitute a soft-law framework that addresses three different elements of the state–business nexus: first, the state duty to protect against human rights abuses, including by business enterprises; second, the corporate responsibility to respect human rights, including through human rights due diligence; and third, access for victims of business-related human rights abuses to effective remedies (United Nations Human Rights Council 2011). In terms of ensuring human rights due diligence, the UNGPs

invoke human rights impact assessments (HRIAs) and set expectations of both state and business entities with regard to HRIAs. In meeting their duty to protect, states should, for instance, "(a) enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (b) ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights; (c) provide effective guidance to business enterprises on how to respect human rights throughout their operations" (ibid.). The guidelines iterate that the failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in state practice—for instance, in relation to labor, nondiscrimination, or privacy laws. Further, it is important for states to review whether these laws provide the necessary coverage in light of evolving circumstances. The UNGPs framework has been widely praised by both states and companies but also criticized for its slow uptake, ineffectiveness, and lack of binding obligations on companies (Aaronson and Higham 2013; Bilchitz 2013).

In practice, identifying the human rights impact of the technology sector is complicated by a number of factors, such as the diversity of the sector. In relation to the focus of this book, that is, the social web, the companies' role in facilitating rights of expression, information, and participation means that business activities intersect with human rights in ways that are different from the classical human rights and business scheme. Often, in the business and human rights landscape, there is a relatively clear and identifiable human rights violation and a relatively clear and identifiable violator. Some of the human rights violations in the technology sector look like these kinds of violations, for example, a company's poor treatment of workers. There is, however, an additional layer of human rights harms in the technology sector compared to this classical scheme as addressed extensively by Land in this volume. Besides having obligations toward their employees and the community in which they operate, the companies may affect billions of users' human rights as part of the services and platforms they provide. This particular feature of their services poses significant challenges when determining their human rights responsibilities. Thus, while the companies may be contributing to a range of human rights violations, including labor and community harms, their impact on users' ability to

communicate, participate in public life, and retain a sense of privacy is unique to these companies. Effectively, their role as intermediaries and gatekeepers in the online ecosystem implies that the manner in which they collect, process, prioritize, curate, share, and remove content shapes the boundaries for public and private life on the Internet. As Kaye notes, it remains an open question how human rights concerns raised by corporate policy, design, and engineering choices should be reconciled with the freedom of private entities to design and customize their platforms as they choose (Kaye 2016, 55).

Also, it is important to recognize the distinction between human rights law that is focused on the relationship between the individual and the state, and the private law that governs the economic relations among individuals and business entities. While in general the separation of the spheres of law has been respected, the division is being demolished, not least in Europe (Collins 2011, 1). This is due to at least two developments in legal thought. First, fundamental rights and principles are increasingly regarded as constitutional values of an entire legal order that should infuse both public and private law since the legal order should be aligned with these fundamental principles (Barak 2001, 21–22). Second, private law is perceived increasingly as another arm of the regulatory state, designed to secure social goals, and like other exercises of power by agencies of the state, subject to the constraints of human rights law (Collins 2011, 2). "It becomes appropriate, for instance, to ask whether a particular result in contract law adequately protects the autonomy and dignity of an individual, or whether tort law provides sufficient protection for an individual's right to privacy" (Collins 2011, 3). Irrespective of these developments, the responsibilities for a business entity under human rights law is arguably a more blurred, soft, and unfamiliar terrain compared to private contract law, not least in the United States.

Another of the developments that have placed the role of technology companies increasingly high on the human rights agenda is the fact that the debate on Internet intermediaries and policy responses such as co- and self-regulation, while certainly not new, has taken on a new dimension with the concentration of services within technology giants. In practice, the line between co- and self-regulation is often blurred, but in general self-regulation refers to practices whereby a company defines, implements, and enforces norms without public intervention, whereas coregulation

refers to the voluntary delegation of all or some part of implementation and enforcement of norms from public authorities to a company (Frydman, Hennebel, and Lewkowicz 2008, 133–134). The EU, for instance, has for the past two decades enlisted Internet companies in frameworks of self- and coregulation to assist the EU member states in preventing illegal content in the online domain (Frydman and Rorive 2003; Korff 2014; Schulz and Held 2001; Tambini, Leonardi, and Marsden 2008). While such EU policies clearly have an impact on individuals' human rights, they have largely been formulated and implemented without an explicit recognition of the human rights issues they raise (Angelopoulos et al. 2016; Jørgensen et al. 2016). "A growing amount of self-regulation, particularly in the European Union, is implemented as an alternative to traditional regulatory action. Some governments actively encourage or even place pressure on private business to self-regulate as an alternative to formal legislation or regulation which is inherently less flexible and usually more blunt than private arrangements" (MacKinnon et al. 2014, 56). Most recently, the EU has promoted self-regulation as a tool to counter hate speech on major Internet platforms, thereby affecting the ways in which users encounter content on sensitive topics, as addressed by Jørgensen and McGonagle in this volume.

Since 2016, both the UN Special Rapporteur on Freedom of Expression, and his counterpart, the UN Special Rapporteur on Privacy, have pointed to the human rights implications of technology companies as an increasingly important area of concern. "Vast social media forums for public expression are owned by private companies. Major platforms aggregating and indexing global knowledge, and designing the algorithms that influence what information is seen online, result from private endeavor" (Kaye 2016). "This increasingly detailed data-map of consumer behavior has resulted in personal data becoming a commodity where access to such data or exploitation of such data in a variety of ways is now one of the world's largest industries generating revenues calculated in hundreds of billions most usually in the form of targeted advertising" (Cannataci 2016). What remains a major challenge is to determine the human rights responsibilities of these companies, and the extent to which their business practices interfere with human rights law. As illustrated in the previous section, the literature on technology and human rights has exploded over the past twenty years; however, the human rights implications of the social web are still underresearched, including whether specific business practices invoke a positive state obligation to

regulate the companies. For example, will new regulatory responses such as the GDPR provide (European) users with effective protection of their online privacy rights? (See Van Hoboken's analysis in this volume.) When does content moderation amount to a freedom-of-expression issue, and if/when it does, does this invoke a positive obligation on the state to regulate? (See the chapter by Land, in particular.) Further, and irrespective of state regulation, what is the scope of the business responsibility to respect human rights law? (See Callamard's analysis in this volume.) While there is an increasing attention to these issues, the assessment and mitigation of the companies' human rights impact have largely been left to the companies to address through corporate social responsibility frameworks and industry initiatives such as the Global Network Initiative (Maclay 2014).[16] Up until now, there has been limited research that critically assesses the frameworks governing the activities of these companies and questions whether they are sufficient to provide the standards and compliance mechanisms needed to protect and respect human rights online (Laidlaw 2015). In sum, the companies that govern the social web effectively operate in a gray zone between human rights law and corporate social responsibility, with no authoritative answer as to what their human rights responsibility entails.

In the section that follows, I will briefly explain how the book has been organized to address these urgent questions and challenges.

Contents of the Book

The first part of the book, "Datafication," highlights some of the societal shifts that are at play, focusing on the economic model of data extraction as a means to control human behavior, the corporate shaping of "informed realities," datafication and its democratic deficits, and the (inadequate) understanding of what constitutes personal information in an algorithmic age. Drawing upon a long tale of scholarly work, the contributions highlight theoretical and conceptual challenges that have implications for how we frame, engage, and resolve questions concerning the protection of human rights online.

Zuboff's chapter, "'We Make Them Dance': Surveillance Capitalism, the Rise of Instrumentarian Power, and the Threat to Human Rights," discusses the giants of the social web as a new kind of power with a radical impact on the possibility for self-determination and autonomous action. Zuboff argues

that these companies represent a market project that fuses with technology to achieve its own unique brand of social domination. From the vantage point of radical indifference, the companies rely on instruments to monitor, analyze, shape, and predict our actions, in pursuit of the competitive advantage that follows. Based on a brief overview of the framework of surveillance capitalism, Zuboff unmasks the instrumentarian power that arises from the application of surveillance capitalism's economic imperatives and contrasts this new power with the totalitarian construct with which it is typically confused. The development of these conditions demands new forms of collective action, resistance, and struggle, as contests over political rights are renewed, human rights are abrogated, and even the "right to have rights" is under siege.

Flyverbom and Whelan's chapter on "Digital Transformations, Informed Realities, and Human Conduct" explores the influence of datafied forms of knowledge on human choice and agency. The chapter proposes the notion of "informed realities" to discuss how people's ways of experiencing are governed by the different types of information they access and rely on. Notably, platforms inform people's daily lives by constructing and controlling the informed realities that they live in and live with in digital spaces. The authors warn that the growing ubiquity of these platforms and services increasingly shapes the way we view the world, while constraining and directing our decision-making in invisible ways. In conclusion, the authors suggest a number of steps to keep this development in check

Bechmann next explores "Data as Humans: Representation, Accountability, and Equality in Big Data." The chapter raises questions of representation concerning the way data are treated as humans in the datafied society, and the democratic deficits this may lead to. Bechmann argues that systematic discrimination and inequality may occur through machine learning if we fail to take the preliminary measure of inscribing human rights norms in the machine learning algorithms executed by, for instance, social media. While problems of representation are not new, discrimination may now happen in a more systematic way, fostered by data mining and the closed cycles of machine learning algorithms that need to be properly governed.

Supplementing Bechmann's concern, albeit from a different perspective, Mai's chapter on "Situating Personal Information: Privacy in the Algorithmic Age" critically examines how we conceptualize personal information

and thus informational privacy in a time of big data. The chapter argues that the predominant conceptualization of informational privacy as the ability to control the flow of personal information is inadequate in an age of big data, algorithms, and an economy based on data profiles. Instead, informational privacy must be concerned with the situations and practices in which the construction, analysis, and interpretation of information take place. Mai suggests that privacy cannot be limited solely to an individual, liberal right but should be expanded to an expectation of moral norms and behavior in society.

The second part of the book, "Platforms," brings us closer to actual platform practices. It considers the evolving history of business practices for capturing, measuring, and managing attention; explores content moderation in relation to public discourse; and illustrates the corporate storytelling around human rights. In short, it examines examples of how platforms and services operate, how they relate to human rights, and what the wider societal implications of their practices may be.

Bermejo's chapter on "Online Advertising as a Shaper of Public Communication" traces the history of online advertising and illustrates how the intimate link between communication and data mining in today's online public sphere is rooted in the development of the advertising model over the past two decades. Bermejo uses the process of capturing, measuring, and managing attention—the core of the advertising industry's work in the mass media era—as a blueprint for understanding the way online advertising is conducted on the social web, and to examine the wider social and democratic implications of this model.

Moving closer toward the governance practices of platforms, York and Zuckerman's chapter on "Moderating the Public Sphere" traces the history and character of content moderation as a widely used method of (private) control over public discourse. The concepts of hard and soft control are used as a lens to characterize platform authority over what can be published online versus platform authority over what users are likely to see—or not see if the content is deprioritized in the algorithms that govern a user's feed. The practices of major platforms are examined within the larger context of threats to freedom of expression, including threats from state actors and threats from individual users acting alone or in concert. The authors argue that as instances of flawed content moderation reach the public, there is the opportunity for a strong citizen movement—one that monitors the

abuse of power by platforms, demands transparency, and fights for freedom of expression.

Jørgensen's chapter on "Rights Talk: In the Kingdom of Online Giants" continues the examination of platform practices, this time from the perspective of staff at Google and Facebook. Based on empirical studies, the author presents three examples of human rights storytelling within the two companies. The first narrative paints the companies as safeguards against government overreach. The second narrative concerns their role as coregulators via codes of conduct, while the third narrative presents privacy as user control over personal information. While the companies take great pride in protecting their users' right to freedom of expression and privacy from government overreach, their own business practices are not framed as a human rights issue nor subjected to the same type of scrutiny as government practices.

The third part of the book, "Regulation," considers human rights challenges raised by these developments and examples. Given the theme of the book, the relationship between human rights law and private actors is of particular significance in this part, not least the reach of international human rights law vis-à-vis soft law such as the UNGPs. The contributions explore the human rights responsibility of non-state actors, the Council of Europe approach to Internet intermediaries, and the disconnect between platform practices and users' right to privacy and, finally, suggest a human-rights-based approach to regulating Internet intermediaries.

Callamard confronts one of the overarching questions of the book, namely, "The Human Rights Obligations of Non-state Actors." Based on a wide array of examples from around the globe, the chapter discusses challenges to human rights protection—and freedom of expression in particular—in an environment shaped by global communications systems and powerful non-state actors. The chapter traces the obligations of non-state actors to international treaty provisions; explores their treatment as international human rights law duty bearers; and discusses their role in influencing, if not shaping, normative development. In conclusion, Callamard explores "meaningful self-regulation" and the development of an international legal framework as two options for stronger human rights protection in the online domain.

In "The Council of Europe and Internet Intermediaries: A Case Study of Tentative Posturing," McGonagle explores the efforts of the European

Court of Human Rights to keep apace of technological developments and to retain and revamp its general freedom-of-expression and rule-of-law principles in an online environment dominated by Internet intermediaries. As part of this, the chapter considers the legal complications involved in bringing Internet intermediaries into the fold of a traditional, international, and treaty-centric system, including the role of self-regulatory measures. The author concludes with a reflection on the rights, duties, and responsibilities of Internet intermediaries that flow from the existing system, using the case of "hate speech" to illustrate how frictional the relationship between intermediaries' rights, duties, and responsibilities—and those of their users—can be in practice.

The right to privacy faces particular pressure in an age of datafication, as outlined in the first part of the book. Van Hoboken's chapter on "The Privacy Disconnect" responds to these challenges and explores the legal questions involved in the contemporary protection of online privacy. The chapter discusses and reviews some of the major obstacles to regulation of the personal data economy, including consolidation in the Internet service industry; the erosion of restrictions on the collection of personal information; the tension between the different regulatory approaches in the United States and Europe; and the fact that privacy regulation is primarily concerned with the handling of personal data rather than a broader concern for fair data-driven treatment, data privacy, and autonomy. Van Hoboken argues that current privacy laws and policies fall short in providing for the legitimacy of current-day pervasive data-processing practices and proposes that privacy law and policy discussions become more firmly connected to the underlying power dynamics they aim to resolve.

The book concludes with Land's chapter on "Regulating Private Harms Online: Content Regulation under Human Rights Law." Land draws upon and supplements the previous analysis (not least by Callamard) by developing a human rights–based approach to regulating the impact of Internet intermediaries, focusing on content regulation in particular. As part of this approach, Land addresses three challenges: first, the inadequate understanding of what constitutes state action in the online domain; second, the tendency to neglect the duties that international human rights law imposes directly on private actors; and third, the lack of attention toward the positive duty of the state to regulate intermediaries in order to protect rights online. Land proposes a set of recommendations that can be adopted by

human rights institutions such as the UN Office of the High Commissioner for Human Rights and the UN treaty bodies, in order to strengthen human rights protection in online spaces.

Notes

1. "Social web" refers to online platforms and services designed and developed to support and foster social interaction.

2. There is large body of literature related to the field of human rights. For scholarly introductions, see, for instance, Alston and Goodman (2013) and Freeman (2014).

3. Data processing performed by national police forces and courts (for certain functions) is not subject to the GDPR but regulated in a separate EU Directive on policing and criminal justice.

4. "Datafication" refers to the practice of turning numerous aspects of life into data and transforming it in order to create value. The term was introduced by Cukier and Mayer-Schoenberger in 2013 (Cukier and Mayer-Schoenberger 2013).

5. See https://www.ctrl-shift.co.uk/personal-information-economy-2016.

6. For a full list, see https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/C10Tb8ZfKDoJ/content.

7. A/HRC/RES/34/7 (March 23, 2017), A/HRC/RES/32/13 (July 18, 2016), A/HRC/RES/28/16 (April 1, 2015), A/HRC/RES/26/13 (July 14, 2014), A/HRC/RES/23/2 (June 24, 2013), A/HRC/RES/20/8 (July 16, 2012), A/HRC/RES/12/16 (October 12, 2009), A/HRC/DEC/25/117 (April 15, 2014), A/HRC/DEC/18/119 (October 17, 2011).

8. For a full list, see http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx.

9. For a full list of publications under UNESCO's series of Internet Freedom, see https://en.unesco.org/unesco-series-on-internet-freedom.

10. For a full list, see https://www.apc.org/en/apc-wide-activities/global-information-society-watch.

11. "Internet intermediaries" refers to "third-party platforms that mediate between digital content and the humans who contribute and access this content" (DeNardis 2014, 154).

12. "Monopoly" refers to "an organization or group that has complete control of something, especially an area of business, so that others have no share"; see https://dictionary.cambridge.org/dictionary/english/monopoly.

13. A "public utility" refers to "a business organization (such as an electric company) performing a public service and subject to special governmental regulation"; see https://www.merriam-webster.com/dictionary/public%20utility.

14. A "natural monopoly" refers to "a situation in which one company is able to supply the whole market for a product or service more cheaply than two or more companies could"; see https://dictionary.cambridge.org/dictionary/english/natural-monopoly.

15. See, for instance, the response to Jonathan Taplin from Tim Worstall, April 23, 2017: https://www.forbes.com/sites/timworstall/2017/04/23/google-isnt-a-monopoly-so-dont-break-it-up-or-regulate-it-like-one/#68a5c3746ad0.

16. See, for instance, the Global Network Initiative report on the 2015/16 Assessments of Facebook, Google, LinkedIn, Microsoft, and Yahoo!: http://globalnetworkinitiative.org/sites/default/files/PAR-2015-16-Executive-Summary.pdf.

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