Reflections on Digital Human Rights Practice Research and Human Rights Universality

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Abstract

The idea of universality of human rights is under multidimensional challenges entailing the aspects of practice generalization and postmodern social theories with juridical ambitions. Competing theories continue to exist and the elements of choice between theories are determined by practice, convenience and economies and not necessarily by idealistic goals. Among the many arguments raised against the universality of human rights stands the network approach, which is characterized by permeability, its supportive purpose of vertical normative structures, its impact on the rise of social responsibility, obscuring effect on legitimacy and "reliance on trust". Supportive purpose of vertical normative structures in a network means that private networks can articulate the claim for correctness in self-regulation due to the existence of the vertical normative backbone. One of the main reservations related to digital human rights law and remedies through the network approach is that of distortion of legitimacy. The article approaches these issues through a novel theoretical approach of non-coherence.

Keywords: non-coherence theory of digital human rights, network approach, universality of human rights, transversality effect.

This special edition of the East European Yearbook on Human Rights presents the first three reports produced by the Global Digital Human Rights Network (the GDHRNet) in 2021. The Network has been created and funded through European Cooperation in Science and Technology (COST).[1] These comparative studies address, in general, the growing role of social media in public governance, especially as a communication tool between the public power and civil society. We are faced with two governors – those who have assumed office through traditional ways of elections and those who have taken this via business. The reports offer a glance into practices of various countries, leading to generalizations of how social media has gained more maturity and acceptance in times of crisis. Whether this maturity goes hand in hand with understanding and fulfilling responsibilities, that is, creating a tandem between human rights law and technical development, is something that opens from the reports. Against this background of practice analysis, this special edition opens with reflections on the fundamental aspects of

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human rights law in the digital domain, especially from the perspective of justifiability of the universality of human rights.

The idea of universality of human rights is under multidimensional challenges entailing the aspects of practice generalization and postmodern social theories with juridical ambitions. The aspect of practice will not be addressed in this short intervention, since it is the focus of reports in the special edition, and at the end of the day practice may change. The postmodern challenge is of fundamental nature and a logical consequence of the plurality of social and legal discourses. The concomitant element of postmodern statehood and modern social sciences is the collapse or unjustifiability of discourses based on one grand idea.[2] Teubner has advanced the transversality thesis to counter the rivalry and incompatibility of various social theories and discourses. The transversality approach in law means the following according to Teubner:

> The law recognizes that under extreme differentiation of society, there is no more a justification for the existence of any single generally valid social theory, but only for a multiplicity of theories of social areas which are equal in terms of their origin. These derive their justification from their coexistence, i.e. from the high level of autonomy and the simultaneous reciprocal interdependencies of different social rationalities. … It would defend itself against any claim to totality of any theory; however, it would accept the intrinsic right of social theories that exist side by side.[3]

Application of the transversality approach towards digital human rights would effectively quiet the voices that speak against expansion of private self-normativity.

The transversality effect for mutually incompatible social theories is that of non-exclusivity. Competing theories continue to exist, and the elements of choice between theories are determined by practice, convenience and economies and not necessarily by idealistic goals. Because Teubner does not propose any specific quality standards or quality control elements for a theory to qualify into the circle of competing theories, transversality becomes an instrument for human rights theory to lose its quest for justification and leads to the extreme principle of 'anything goes' within the meaning of Paul Feyerabend's epistemological anarchism.[4] Under the umbrellas of transversality and Günther's poly-contexturality[5] the practice-driven approaches of powerful private global online companies claim existence as equals with human rights theories of long standing. Epistemological anarchism minimizes justificatory elements, the consequence being that anything that private online companies undertake can claim validity from the human rights

2 The collapse of the *grands recits – see* Wolfgang Welsch, *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Frankfurt 1996), or weakening of social practices based on an *idée directrice – see* Maurice Hauriou, La théorie de l'institution et de la fondation: Essai de vitalisme social, in: *Aux sources du droit* 89-128 (Maurice Hauriou ed., Caen (1986 [1933]).

3 Gunther Teubner, Law and Social Theory: Three Problems (4 May 2014). Available at SSRN: https://ssrn.com/abstract=2432631 or http://dx.doi.org/10.2139/ssrn.2432631, p. 7.

4 *See* Paul Feyerabend, *Against Method* (London: Verso 1975).

5 Gotthard Günther, Life as Poly-Contexturality, in: *Beiträge zur Grundlegung einer operationsfähigen Dialektik I* 283-306 (Gotthard Günther ed., Hamburg 1976).

perspective. To reject the suitability of the transversality approach means to reject the acceptability of competition between theories regarding human rights. Paraphrasing Feyerabend (science is not one thing but many), one can say: human rights containing identical names are not identical or similar but varied. And the arguments from the learned colleagues cited would not be able to show why human rights in the traditional value-based meaning can claim superiority or priority over the 'modern' efficiency-based meaning of human rights. Transversality accepts the 'right' of scientifically unvalidated human rights approaches to exist side by side with validated approaches. The non-coherence aspect becomes evident regarding the claim of universality of such theories. Building on Weber's 'new polytheism', which makes monotheism theories impossible,[6] Teubner writes:

> There is no longer one theory of society, but only equally justified partial theories relating to areas of society. Yet each one of these – and this is what gives rise to concern – at the same time lays claim to universal validity as the sole theory of society.[7]

The claim to universality is evident in legal theoretical discourses and needs no repetition here. Yet the theories of digital human rights may be immune against the claim of totality for a different reason. These theories or approaches (which may not mount to the meaning of theories) are concerned primarily with secondary-level normativity and have no interest in totality owing to the idealism abyss thesis. Non-coherence theory – which I have developed elsewhere – shows that the element of totality claim is absent from the transversality image of digital human rights. This is the result of the changed nature and content of digital human rights norms and procedures in comparison with non-digital.

Among the many arguments raised against the universality of human rights stands the network approach, which deserves more scrutiny in what follows. Castells' 'network society' theory characterizes the postmodern societies in all elements, including legal and fundamental rights. The concrete content for judicial concepts and legal norms is derived through the network, which means that the network-given meaning may and may not coincide with the original meaning attributed to these concepts and norms. Variance can be that of a degree. The broader is the variance, the higher is the likelihood of the incompatibility of meanings. Network failures become serious social risks.[8] Ladeur responds to this suggestion of potential risk through the concept of 'social inquirers', which develops sufficient variety and dynamism and allegedly produces knowledge and possibilities of action that are of common benefit.[9] I would term this approach the mutual benefit assumption thesis, that is, network society enables society at large, including its legal manifestation, to operate more efficiently for the common good in comparison with other theoretical approaches. The question that follows

6 Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre* (Tuebingen 1968), 605 ff.
7 Teubner, 2014, p. 4.
8 Manuel Castells, *The Rise of the Network Society* (Oxford 2000).
9 Karl-Heinz Ladeur, Der Staat Gegen die Gesellschaft, at V (2006), 4.

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concerns the applicability of the mutual benefit assumption thesis in digital networks.

My reading of the main features characterizing the network approach identifies permeability, its supportive purpose of vertical normative structures, its impact on the rise of social responsibility, obscuring effect on legitimacy and 'reliance on trust'. Permeability is understood as the process whereby the borders between the public and the private domains become more and more dependent on one another.[10] Permeability can exist in the format of an idealistic idea or observation from practice or a combination of both. It is a process of tandem, resting on the assumption of both the private and the public domains' realization of utility. Its primary function is knowledge gathering, ideally leading to more information for normative and behavioural decision-making. The idea of permeability remains idealistic concerning the digital networks owing to the absence of longitudinal patterns of subsidiarity and mutual support. An example of idealistic permeability is the idea of a 'cyber court', where the state authority would authorize special institutions comprised of experts to decide on the cases of Internet-centred rights conflicts raised by users and the private online enterprises would use such courts as an effective remedy by guaranteeing implementation of decisions. The idea has not developed beyond the stage of an idea owing to some obstacles that, whatever their exact nature, reveal the absence of permeability. The digital domain rather produced evidence to the contrary – non-permeability, which explains many of the processes described in the reports following, the common denominator being the absence of mutual trust.

Supportive purpose of vertical normative structures in a network means that private networks can articulate the claim for correctness in self-regulation owing to the existence of the vertical normative backbone. The variance from the offline domain is related to the goal of the supportive normative structure, whereby the institutionalized vertical separation of powers[11] in the offline domain is focusing on the end result of achieving a more effective regulation, and in the online domain the institutionalization is focusing on the very existence of such backbone, notwithstanding any claims of efficiency or quality.[12]

Commenting on Ladeur's expectation that networks lead to increased social responsibility from the side of network participants, Viellechner puts forward the vision that the individual and group-based legal relationships may allow for the

10 Paul Schiff Berman, From International Law to Law and Globalization, 43 *Columbia Journal of Transnational Law* 485 (2005).

11 *See* about the institutionalization of vertical separation of powers – Anne Peters, The Globalization of State Constitutions, in: *New Perspectives on the Divide Between National and International Law* 251, 273 (Janne Nijman & André Nollkaemper eds., 2007).

12 By the time this short intervention gets published more whistle-blower revelations may have emerged from inside the social media, but the statements of Frances Haugen (*see* CBS news release on 4 October 2021 – www.cbsnews.com/news/facebook-whistleblower-frances-haugen-misinformation-public-60-minutes-2021-10-03/ (accessed on 23 November 2021) led to claims in US media from Facebook executives asking for concrete guidelines from the legislature. This is a clear example of the necessity of vertical normative backbone in times of crisis; we note that the claims are talking about the need for the structure and not what is achievable through such a supportive backbone.

creation of a more adaptive and productive model of public governance.[13] This statement remains abstract and lacks concrete evidence of whether such a model of public governance is actually achieved is no more than rhetoric. It suffices to claim here that the importance of evidence is weakening when one writes about the allegedly positive aspects of what the network theory can produce.

One of the main reservations related to digital human rights law and remedies through the network approach is that of distortion of legitimacy. It appears in different versions, which at first sight are polarized and irreconcilable. The first version claims that the legitimacy argument is lost in networks, and the second claims, to the contrary, that networks are capable of providing human rights legitimacy. Habermas represents the first version and posits that the network model's side effect for law is the supposedly misleading claim for legitimation.[14] *A contrario* it is claimed that in terms of legitimacy networks do not seem to fall behind in common standards,[15] which means that the ideals of democratic legitimacy have to be rejected. These apparently incompatible views are reconcilable through the non-coherence approach, which disrupts the starting point in the argumentation of legitimacy in digital networks and claims that the expression 'legitimacy' may mean different things in offline and online realms. The offline meaning of legitimacy is inseparable from vertical handing down of discretionary power, guaranteed by some form of public normative governance and traditional forms of judiciary. The online meaning of legitimacy is independent of these elements, that is, legitimacy is acquired through some other forms of authority for norm creation and realization.

Finally, Fukuyama has suggested trust as a characterizing feature for networks.[16] For human rights in the offline context this means that the normative solutions proposed by networks generate collective social order. Trust serves here as the connecting function between the origin of regulation and its legitimacy. If someone now applies the sameness doctrine and uncritically transposes the element of trust from the offline to the online human rights dimension, this transposition goes hand in hand with the assumption that also the regulation created by the online domain generates collective social order and is legitimate. Not much has to be added here for the following reasons. First, the belief in the trustworthiness of online stakeholders may belong irreversibly to the past, so that prima facie the element of trust is losing its relevance as a characterizing element of networks. Secondly, and more importantly, the semantic aspect of trust refers to the process that has led to trustworthiness. Trust is something that needs to be earned and is thus a result of a process. Transposition of the element of trust from offline to online networks deprives trust of its original semantic meaning, since trust would then not be something that has to be earned but something that is

13 Lars Viellechner, The Network of Networks: Karl-Heinz Ladeur's Theory of Law and Globalization, in: Special Issue: The Law of the Network Society. A Tribute to Karl-Heinz Ladeur, 10(4) *German Law Journal* 530 (2009).

14 Jürgen Habermas, A Political Constitution for the Pluralist World Society? 34 *Journal of Chinese Philosophy* 331 (2007).

15 Viellechner, 2009, p. 529.

16 Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (1995).

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given. Non-coherence theory of digital human rights explains that this is what happens when concepts are automatically taken from the offline realm and planted into the online.

All three reports in the current special edition touch on the issue of self-normativity of digital stakeholders. Self-normativity refers to the shift in the origin of legal rules applied for rights protection. In the broader sense, it entails standards and concrete norms, and in the narrower sense it entails only the latter. By assumption, self-normativity excludes or relies to a limited extent on vertical delegation, such as from a domestic constitution or statutory law or international legal instruments. Broad self-normativity of standards and norms shows an image where the normative relational chain between legal subjecthood and normative authority is completely broken. A mafia-type organization serves as an example. Narrow self-normativity breaks the normative relational chain only for the secondary norms, excluding the self-control and revision of primary norms.[17] Self-normativity can be considered a phenomenon of modern statehood,[18] opposed to the conception of homogeneous global and domestic law and epitomizing the loss of legitimacy through some "higher order of law".[19]

Self-normativity in digital human rights law and practice is explainable through the heterarchy concept, terming the process whereby hierarchical delegation of normative regulation is replaced by the self-organization of the legal system. This concept is partly rooted in the interconnectedness with and dependence of normative regulation and practices on knowledge development – fast technological advances lead to and are based on new knowledge, and therefore relying on traditional law-making mechanisms would mean consistent emergence and perpetuation of legal vacuums.

Justification of self-normativity is based on the recognition of a continuous reconsideration process of legal norms as unavoidable.[20] Judicial evolution is seen as the key reason for heterarchy, as expressed by Ladeur in reference to global administrative law:

> The evolution of both domestic and transnational administrative law will allow for new heterarchical forms of accountability and legitimation once the focus on a hierarchical concept of delegation is given up. Both for domestic and global administrative law the adoption of new approaches to ex post monitoring of administrative action and learning seems to be more promising than the traditional orientation on the binding force of legal rules ex ante.[21]

17 The conceivability of narrow self-normativity may run counter to Hart's thesis that secondary norms are necessary for the stabilization of positive law.

18 François Moreau, The Role of the State in Evolutionary Economics, 28 *Cambridge Journal of Economics* 847 (2004).

19 Karl-Heinz Ladeur, The Emergence of Global Administrative Law and Transnational Regulation, *IILJ Working Paper* 2011/1 (History and Theory of International Law Series), New York School of Law.

20 Kathleen Noonan, Charles F. Sabel & William H. Simon, Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform, 34 *Law & Social Inquiry* 523, 524 (2006).

21 Viellechner, 2009, p. 3.

Heterarchical direction of judicial evolution can lead to what Teubner terms as the auto-constitutionalization of the global civil society in its own right.[22] Once the assumption of self-constitutionalization inherent in self-normativity becomes validated – and there is no reason why it should not – such self-constitutionalization necessitates a theoretical justification from legal theory. Conceptual pluralism based on the plurality of states, divergent arenas of decision-making with heterogeneous participants, national or international agencies, private actors – including private stakeholders and non-governmental institutions[23] – leads to the severing of traditional conceptual and institutional separations inherent in well-established legal systems.

Much more could be said about the matter of human rights universality in the digital domain, but these matters will be taken up in more detail elsewhere in the future. It is time now to allow the reader a glimpse into the three highly eye-opening studies.

22 Gunther Teubner, Fragmented Foundations: Societal Constitutionalism Beyond the Nation State, in: *The Twilight of Constitutionalism*? 327 (Martin Loughlin & Petra Dobner eds., 2010).

23 Peer Zumbansen, Transnational Legal Pluralism, 1 *Transnational Legal Theory* 141, 144, 159 (2010).

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