

Intermediaries vs. States or Intermediaries and States: Democracy in the post-intermediation age

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Democracy in Flux

Order, Dynamics and Voices in Digital Public Spheres

Intermediaries vs. States or Intermediaries and States

Democracy in the post-intermediation age

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1 INTRODUCTION

Humans are social beings. We experience ourselves through others. A lot of communication has now moved to online spaces. As the European Court of Human Rights put it in 2015, the internet provides “essential tools for participation in activities and discussions concerning political issues and issues of general interest” (ECHR 2015). In that sense, it is well accepted that “the internet plays a particularly important role with respect to the right to freedom of expression” (Committee of Ministers of the Council of Europe 2018), and that this role relies on private intermediaries’ digital platforms that not just regulate access to the online communication space, but constitute – through their rules – large parts of it (Kettemann/Schulz 2020).

Given the normative frame for online communication is thus to a large extent defined by private actors, how can states, citizens and users influence the rules which determine the limits of what may be said online? Do rules formulated exclusively by intermediaries exercising their rights ipso facto suffer a legitimacy deficit? Can stronger interventions by states into private processes of rulemaking and -enforcement improve this status quo (Kettemann/Tiedeke 2020), or do they constitute an even larger danger (Fertmann/Kettemann 2021)? Is the normative friction between the Old and the “New Governors” (Klonick 2017) ever increasing, or rather apt for dissolution through a stronger mutual integration of private and public rule-making systems into more symbiotic relationships? If the latter is the case, how could such a re-integration look like?

2 STATES VS. INTERMEDIARIES

When considering approaches to dissolving the sometimes messy regulatory private-public simultaneity, one may consider full-scale state interventions in order to establish democratically legitimate and accountable oversight. However, recent examples for the dangers associated with such an approach tell a cautionary tale, even for presumably robust democracies, as such an interventionism is prone to escalate into officeholders attacking intermediaries as proxies for suppressing political speech and public discourses. Repressive regulation, bans of intermediaries’ platforms or even criminal prosecution and imprisonment of employees – or the threat of any of these restrictions – have recently been used in translucent schemes to make intermediaries’ intervene in favor of those in power in Belarus (Human Rights Watch 2020), India (Mahapatra/Fertmann/Kettemann 2021), Myanmar (Irving 2019), Nigeria (Nwokoro 2021), Russia (Roache 2021) and in the United States under the previous administration (Duan/Westling 2020), sometimes in contradiction to the respective states’ obligations under international human rights law. Therefore incentives for intermediaries’ *non-compliance* with state requests are needed, if and to the extent which these requests are inconsistent with applicable international law.

3 INTERMEDIARIES VS. STATES

The global conversation around the question who the *least-worst* actor to control speech on the internet is, states or private platforms, is on the other hand also driven forward by cases in which intermediaries destabilize or even restrict states and public actors through and on their platforms. Intermediaries’ acting against (perceived) harmful communication of government agencies, public office holders and politicians, such as in the case of the deplatforming of former U.S. president Trump, justifiably also face significant scrutiny for the increase of intermediaries’ discursive power

associated with them. Next to this specific facet, general concerns relating to confining private power over individual freedoms and securing the societal prerequisites of social cohesion accentuate the need for increasing accountability of intermediaries' governance systems.

4 DEMOCRATIZING INTERMEDIARIES

Against this background, it seems almost unavoidable that institutions for overseeing intermediaries' governance systems emerge that are constructed from a public/societal *as well as* a private point of view: in an environment in which many societies welcome certain measures against content well below the threshold of illegality, but are weary of the corresponding concentration of power in companies' and states' hands, there is not much else to turn to than non-state, non-corporate institutional arrangements. Such "Social Media Councils" (Article 19 2018; Kaye 2018) may function as a point of entry for adapted versions of rule of law-principles or even be a starting point for re-importing democratic values into intermediaries' private orders. Such models may amount to a democratization or even socialization of intermediaries.

These institutions can be designed as enablers of political (user, citizen) participation or as expert-based, private reconfigurations of rule of law-principles. They may be implemented through self-regulation (cf. Facebook Oversight Board) or co-regulation (cf. NetzDG-review panels), as part of larger community moderation systems (Wikipedia Arbitration Committees) or as "soft" advisory institutions (e.g. TikTok regional councils; Twitter Trust and Safety Council) (see Kettemann/Fertmann 2021).

This concept is thus far being applied only to improve companies' governance systems, but it holds promise also for disincentivizing company compliance with unlawful State requests (Donahoe/Hughes/Kaye 2019, p. 13; Douek 2020; Mahapatra/Fertmann/Kettemann 2021) and could therefore also dissolve some normative friction in constellations of "States vs. Intermediaries".

While the existing institutional concepts fall into very different places on the scale between institutional mimicry/whitewashing and meaningful separation of private power, they all still fall short of bridging the regulatory public/private disconnect: existing voluntary self-regulation configurations lack democratic legitimacy and robust enforcement; co-regulatory configurations such as the German NetzDG's review panels have trouble interconnecting with the institutional dynamics of companies' governance systems, thus leaving much of the potential of these institutions unused. A democratic approach is therefore needed, reimporting democratic legitimacy through co-regulatory platform councils as "mini-publics" for user participation.

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