

PART III

Beyond Public/Private

States, Companies, and Citizens

This final part considers the role of the actors – states, companies, and citizens – whose conduct has a bearing on the promotion and protection of rights. It breaks with the traditional binary frame of “public/private” to consider the impact that individual conduct has on the enjoyment of rights, as well as the obligations of states to support the capacity of individuals to protect their own rights. By considering not only states and non-state actors but also individuals, this part creates a more complete foundation for developing effective responses to violations of rights such as privacy and freedom of expression.

In Chapter 10, “Digital Communications and the Evolving Right to Privacy,” Lisl Brunner focuses first on the obligations of states. She considers the evolution of the right to privacy under international law. Brunner notes several areas where this law needs further development, including with respect to the flow of data across borders, as well as the ways in which current efforts to protect personal data are – and are not – responding to those gaps. In Chapter 11, Rikke Jørgensen then examines the responsibilities of non-state actors in respecting and protecting rights and the role of states in regulating them. She notes that core civil and political rights are being exercised in a commercial domain that is owned and operated by private actors, and that user expressions and personal information are the raw material that drives the business models of Internet and social media companies. Jørgensen notes the existence of a governance gap as applied to these companies, which are subject primarily to moral, not legal, obligations to respect rights. This gap is particularly troubling because current approaches to corporate social responsibility focus on how these companies respond to pressure from the state to violate rights but neglect the extent to which the enforcement of their own terms of service negatively affects privacy and freedom of expression.

Finally, in Chapter 12, G. Alex Sinha addresses the role of individuals in ensuring their own safety and security online. Sinha makes the case for greater attention to what human rights law has to say about waiver of privacy rights, since many of the

actions we take in our everyday online communications can undermine our privacy. Drawing a bright line between public and private based on whether information has been shared with, or is visible to, another is increasingly out of sync with modern patterns of communication. The ease with which digitized information can be obtained, shared, and collated today exponentially increases the privacy impacts of even ostensibly “public” information.¹ Further, given the role of private individual conduct in the protection of rights such as privacy, states may have greater obligations than ever before to equip individuals to protect their own rights. Sinha’s research persuasively illustrates the challenges of protecting privacy online and the way in which these challenges may force us to choose between protecting our privacy and participating in democratic culture.

The contributions in this part provide two essential insights into the impact of states, corporations, and individuals in regulating the effects of technology on human rights. First, they illustrate many of the ways in which human rights law, particularly with its binary emphasis on states and non-state actors, needs to adapt to the technological changes that have taken place over the past few years. The chapters by Brunner (Chapter 10) and Sinha (Chapter 12), in particular, identify ways in which current approaches to privacy need further development in order to respond to issues created by new technologies. Data protection law, while important, may only protect limited aspects of what a right to privacy entails, and any human right to privacy must also answer the question of when these rights are waived.

Second, viewing the relationships among states, companies, and citizens reveals significant governance gaps in responding to the impacts of new technologies. An essential element of state duties is the duty to protect individuals from interference in enjoying their fundamental human rights by actors such as corporations. In the context of the Internet, states have not paid sufficient attention to this obligation. As Brunner (Chapter 10) and Jørgensen (Chapter 11) both discuss, states, particularly in Europe, have taken action to protect the right to privacy from infringement by companies. But, as Jørgensen observes, they have not acted as effectively to protect freedom of expression, particularly when private companies enforce their terms of service in ways that are detrimental to human rights.

There are, of course, many obstacles to effective state enforcement of the rights to privacy and to freedom of expression, including the state’s own desire to limit criticism levied against it or its core ideology. In such circumstances, one of the most effective responses we can advocate for is to require all states to ensure that their citizens can protect themselves; for example, by allowing access to the encryption and anonymity tools Sinha describes in Chapter 12. Such tools, along with the remedies that Jørgensen notes, are required by international law and may be a way to increase respect for freedom of expression and privacy even in the face of intransigent states and companies.

¹ D. G. Johnson, P. M. Regan, and K. Wayland, “Campaign Disclosure, Privacy and Transparency” (2011) 19 *William & Mary Bill of Rights Journal* 959–82 at 960.