The Politics of Digital (Human) Rights

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Abstract

AU, from OUP: Please revise summary to ORE style. The summary should not read like an abstract. Rather, it should be a brief synopsis of the topic, roughly equivalent to a definition. It should be able to stand on its own as a useful piece of content without reference to a larger article using directional language ("in this paper," etc). It will include the basic facts without the interpretive or synthetic gloss that the full essay will have. The summary should be roughly 250-500 words and should not include first-person language, endnotes, or citations.

Digital rights are human rights in an online setting. Traditional entitlements, freedoms, and protections--such as freedom of expression, privacy, free assembly, and the right to a fair trial--are heavilxy impacted by new information and communications technologies

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1. Introduction

Struggles around digital (human) rights have become a central element of modern politics. These struggles have brought down governments, shaped elections and heavily influence the governance of democratic and authoritarian states alike (Bond et al., 2012; Brenninkmeijer & Marseille, 2021; Gagliardone & Stremlau, 2022; Marsden et al., 2020; Wagner, 2018a). In spite of this, the politics of digital rights are often considered to be 'niche' political issues, outside the scope of more traditional engagements with politics, governance and international relations.

The following article will provide an overview of some of the key elements of digital rights in an international context, looking at how struggles around digital rights are enacted in three domains: diplomacy, law and design. While the different institutional configurations in each of these three domains certainly influence the politics of digital rights, there are also many commonalities. For example, struggles around the right to privacy and freedom of expression are central to all three domains, with other human rights such as freedom of assembly, social rights or workers' rights playing a comparatively marginal role. The commonalities and differences of struggles around digital rights in the three domains will be drawn together in the analysis section, before concluding with an outlook towards the future.

The design of technologies and digital rights

How does the design of technologies relate to digital rights? “Everyone designs who devises courses of action aimed at changing existing situations into preferred ones.” (Simon, 1969). Design looks to highlight, articulate and create agency around the issues of creating systems and putting them in the world. As a result, design touches on digital human rights in many ways, from providing processes to create systems that are privacy-preserving by design (Cavoukian, 2009) to the construction of systems that protect or impinge on those rights, through to techniques to speculate about future possibilities, new rights, or new worlds in which those rights might be enacted. To frame thinking about design and human rights, we can trace some of the key developments in design and the implications they have for practices around digital rights.

Design has moved from Norman’s move to make technology simpler and more pleasurable to use (Norman, 1998), along several different axes. The field has become increasingly collaborative. It is moving from designers thinking in response to their conceptions of people's needs, to practices such as co-designing (E. B.-N. Sanders & Stappers, 2008, 2014) and participatory design (Simonsen & Robertson, 2013) that include the people and communities being designed for in the process. Ideas such as design for values (van de Poel, 2013) look at how design processes can be aligned with human values, including the preservation of rights. Alongside this, the positivist stance of design as ‘solving problems’ or ‘arranging elements in such a way as to best accomplish a particular purpose’ has given way to a wider range of practices that also seek to speculate about the future and critique the present (Auger, 2013; Forlano & Mathew, 2014; Malpass, 2013; L. Sanders & Stappers, 2014) post-industrial turn (Giaccardi & Redström, 2020) ever-changing smartphones that adapt to what users install and tech companies update. Alongside this, there is a sense that

developing a more-than-human perspective (Coulton & Lindley, 2019; Giaccardi & Redström, 2020) is necessary to understand the complex, worldwide relations being developed. Finally, the politics of design have become more strongly pronounced, through manifestos for critical making incorporation of ethics (Ethics for Designers — The Toolkit, n.d.) and moves towards overt stances such as design justice.

In the case of designing with and around technology, there is a parallel to be found here in the development of theory around human computer interaction (HCI). Using the common framing of 'waves' of HCI research (Bødker, 2006, 2015), we can roughly describe the evolution, from i) a concern with a model driven study of humans and their interactions with technology; ii) a broader focus that included groups of people and their communities of practice; to iii) working 'in-the-wild' to understand the interactions between people and technology in all of their messiness, partially driven by the possibilities of mobile and ubiquitous computing and pervasive connectivity (e.g. iPhones). This has led to a fourth wave, that deals with the entanglements between people and the world (Frauenberger, 2020), and places 'politics and values and ethics' centrally (Ashby et al., 2019).

Within this space, design is entangled with rights on many levels. From concrete design choices, such as how user interface decisions allow or disallow certain affordances of technology that set out the actions people may take but can also subtly shape the actions that people do take. To the process level on how to create systems, and the questions of who can understand, engage and intervene in the creation and deployment of technology are driven by design decisions, as are the questions of what kinds of things to design in the first place. In the rest of this section, we pick out some of the key areas where design and digital rights interact to map out the landscape of design for digital human rights.

3.a Why design causes trouble for human rights

Design is an integral part of the digital world we meet in our everyday. Connection with the digital realm happens through smartphones, tablets, computers and other technologies that mediate our interactions. Communication happens through carefully crafted websites and apps, that shape modes of engagement and build the affordances necessary to participate. The design of these digital, physical and hybrid artefacts is fundamental to how people can behave in the online and physical world. Every design choice impacts on whether and how users can access digital products and services and frames the exchanges of time, money attention and data that underpin participation. In this section we will discuss examples of how design practices have been used to undercut digital human rights, to showcase why design must be considered when thinking about human rights in the digital sphere.

3.a.1 Communication devices and surveillance

The ways in which we as a society communicate with each other has radically changed in the last 30 years, largely driven by technological development. In particular, smartphones and other connected technologies, lead to an 'always on' connection to the internet, impacting how we consume news and communicate with each other (Sarwar & Soomro, 2013). The use of these devices has marked a shift into the age of 'surveillance capitalism' (Zuboff, 2019) where human experience is converted into data to be collected and turned into profit. This flow and gathering of data have eroded privacy, since many digital services can only be used if users accept broad uses of their data, such as allowing targeted advertising and data mining. The surveillance capitalism structure is, when it comes to communication, often facilitated by systems that are designed to be highly addictive, that capture attention as a means to track where users go and how they interact online. Through smartphones, surveillance includes

movements in the physical world, carrying out behavioural analysis that can be unexpectedly intimate, such as inferring depressive states from GPS traces (Canzian & Musolesi, 2015).

While the tracking and undermining of privacy facilitated by corporations is problematic, the understanding of human behaviour through the products we use in our everyday life is not limited to just gaining capital. Governments and authoritarian states have picked up the use of digital surveillance tools to facilitate their power and control. While technological communicational development in the recent decades has helped aid civil society groups to mobilize to challenge authoritarian governments, such as the use of social media platforms to gather people during the Arab Spring, this has also given the government more power to quell protests or unwanted organisation earlier in their lifecycle (Dragu & Lupu, 2021). This 'preventative repression' is made possible through technological innovation and access to communications and behaviour data, through mass surveillance in both the physical and digital world (Dragu & Lupu, 2021). Further examples of this are the extensive censorship online in China (Zhu & Fu, 2021), the use of spyware to locate, surveil and potentially harm human rights activists such as seen in Mexico (Scott-Railton et al., 2018), and the use of internet shutdown to e.g., quell protests in Iraq (Chulov, 2019) and Pakistan (Wagner, 2018b). The insidiousness and invisibility of this surveillance means the challenge is not just related to authoritarian regimes but also appears in democratic countries – for example the use of facial recognition by the police force in the United Kingdom (Radiya-Dixit, 2022).

3.a.2 User interface and dark patterns

Access to the digital services happens through user interfaces of various sorts. The interface both gives certain affordances for what people are able to do (Norman, 1998), and also influences what people decide to do. This gives the possibility to manipulate users

to behave in a certain manner or shape population behaviour in specific directions. When designers of user interfaces use their knowledge of human behaviour to create interfaces with deceptive elements and functionalities that are not in the end user's best interest, this is known as ‘deceptive by design’ (Willis, 2020), or ‘dark patterns’ (Gray et al., 2018). There are several ways to do this, from understanding how to social mechanics can convince users of a product (Nodder, 2013, p. 6), to generating paths of least resistance in the user interface that leads the user in the most profitable direction (Nodder, 2013). Dark patterns have raised concerns within the European Union, with the Consumer Protection Corporation highlighting the issues in a report, showcasing the challenge presented to consumer rights by large-scale shaping and manipulation of user behaviour Commission (European Commission, 2022b).

3.b How can design help support human rights

Design practices and strategies can be used to shape and manipulate behaviour, to draw people into surveillance ecosystems and make them complicit in the removal of their privacy. Contrasting trends within design look at ways to empower, support and mobilise users, in support of both their own ends and a more general goal of promoting human rights and justice. Here we look at three areas where design’s power to speculate, critique, resist and shape better futures are used in support of digital human rights.

3.b.1 Design as resistance

Design can directly further the fight for digital human rights, through the creation of systems, products or strategies that are used by activists as part of the practice of resistance. This can take the form of reporting – for example, “The Whistle,” which is a digital app carefully developed in collaboration with people on the ground to facilitate reporting of human rights

violations (McPherson, 2018; TheWhistle.org, n.d.). More rebelliously, Sukey (Sukey - Keeping Demonstrators Safe, Mobile & Informed., n.d.) inverts the tools of surveillance to create a collaborative map showing police activities to help protestors stay safe and mobilize. More physical examples include the activism by the Hong Kong pro-democratic protests, with their simple design of roadblocks and use of simple objects like lasers and spray cans to fight against surveillance. This use of design practices is not at all new – the 'Disobedient Objects' exhibition at the Victoria and Albert Museum in London highlighted objects that resist power 'From a Suffragette tea service to protest robots' (Victoria and Albert Museum, 2015).

Stepping slightly back from the front lines, adversarial design (Disalvo, 2015) uses design to fuel contestation, as a way to discuss and challenge facts and practises of society. Here, design should both create the space for challenging current orders and establish the resources and opportunities to make change. This can include righting imbalances in the data infrastructure, such as citizen science projects that allow populations to collect data so that they have better arguments when going up against governments (Hasenfratz et al., 2012). Taking contested ground such as air pollution, participatory approaches can support citizens in monitoring air quality using smartphones allowing them to gather on a community level and assert their right to clear air (Commodore et al., 2017). Another way of engaging with contestation is using designed objects to highlight current problems. The ShutterCam from Amsterdam Institute of Metropolitan Studies asks, 'how the design of cameras in public space can contribute to a 'responsible' Smart City', through adding a physical shutter on top of CCTV cameras (Shuttercam, n.d.). This makes it clear and obvious when the camera can and cannot see you, supporting the idea of contesting widespread video surveillance.

Finally, there are examples of design that are actively trying to enhance digital rights through their design itself. Organisations such as the Electronic Frontier Foundation continually design both practices for self-defence against surveillance (Electronic Frontier Foundation, n.d.) and technological solutions such as the Privacy Badge browser plugin that blocks a large proportion of online surveillance tools (Privacy Badger, n.d.). The duckduckgo (DuckDuckGo, n.d.) search engine obfuscates user behaviour by mixing many people's search requests, pushing back against the possibility of tracking and modelling.

3.b.2 Design for justice

In recent years, movements within design have called for a more engaged approach to how and what values should be embedded into the design and the design process. Many of these movements are focusing on how design is connected to society on a higher level.

The Design Justice movement (Costanza-Chock, 2020) focuses on how to rethink the design process to centre the people who have previously been marginalized in design, such as non-cis gender, LGBTQ+, people of colour and indigenous community to name some. The movement builds on the idea of participation, through processes that include and empower all of the people affected by design. It leans on movement such as "Nothing about us without us" (Charlton, 2000), that look at how design of products and systems are ableist and is part of oppressing people with disabilities by not designing with them. Related to this, Inclusive Design (Clarkson et al., 2013), aims to make products that can be used by all, taking a starting point in the need for disabled and elderly people to just as much have access to everyday consumer products. Finally, in the technological space, the issues of bias and discrimination in algorithmic systems have emerged as particularly problematic (Binns et al., 2018; Buolamwini & Gebru, 2018). In response, there are particular approaches to develop

more just uses of AI in society, calling for more fair algorithmic systems that will not target existing marginalized groups as disproportionately as now (Birhane, 2021).

The result of changes in design practices is a change in the outcomes of products being designed. The company Apple has shown how to design inclusive software and hardware with a wider range of accessibility, allowing for more people to use their products with disabilities (Fletcher et al., 2015); websites like Contratados.org help migrant workers review potential employers and help empower them on their rights; the interventions of 'Women Reclaiming AI' (Women Reclaiming AI – Artificia, n.d.) prompted changes around the use of gendered voices in voice assistants. Developments of new methods and frameworks are also appearing to support more just design, for example, prefigurative design approaches (Asad, 2019), and the power literacy framework for social design (Goodwill & Bendor, 2021). While these movements have different intentions and focuses, they all actively take a stand for what impact design should have on the world.

3.c. Design to critique the present and imagine different futures

Finally, there is the design that in different ways, shapes and forms engage with societal issues of today, such as digital human rights through the practise of design. The goal of design here is not to necessarily find solutions to the challenges of society but to facilitate debate, explore possible futures or broaden the knowledge of a topic. There are several design disciplines that do this – see e.g., Malpas (Malpass, 2013) for a map. *Critical design* (Bardzell et al., 2012) uses design as a way to provoke and trigger conversation and engagement through an artefact. *Speculative design* (Dunne & Raby, 2013) is the act of imagining different futures, by starting in a contemporary situation and using design to speculate what the future could look like, with the goal of impacting the present. These two

design approaches are similar in that they use the practise of design to highlight, discuss and engage with contemporary dilemmas, as a way to criticise, imagine or challenge. This kind of practice can become participatory, using frictions to understand values (Forlano & Mathew, 2014), or to develop an understanding of the futures seen by marginalised groups (Harrington & Dillahunt, 2021).

Sometimes, the power of design here is to shape high level narratives – for example “CV Dazzle” by Adam Harvey (Harvey, 2011) that developed a set of makeup and hairstyling guides to fight against facial recognition detection software. Despite not being entirely practical, they raise awareness of the issue, through extensive press coverage and striking images. Projects can also work in a quieter manner: Kurbak and Posch’s 'The Knitted Radio' (Kurbak, 2014) drew on traditional practices around knitting to create the idea of subversive radio transmitters that allowed many voices to speak in protest. We can also look at developing new kinds of practice, for example van Kleek et al’s ‘pro-social deception’ (Van Kleek et al., 2016) asks what would happen if people could enlist their devices to lie on their behalf, to push back against surveillance in pursuit of privacy and autonomy. Many of these projects explore, highlight or discuss how the digital impacts our lives and rights and imagines what it could look like, without necessarily arriving at a conclusion.

The rise of connected intelligent autonomous systems is rich ground for the speculative practices in between design and art. The “Care bot” by Caroline Sinders and Alex Fefegha (Sinders, 2019) that is a chat bot designed to highlight the issues of digital harassment and how it is dealt with in society. Looking at surveillance, Lozano-Hemmer’s ‘Pabellón de Ampliaciones’ (Lozano-Hemmer, 2016) makes vivid the experience of being surveyed, by showing real-time footage people and speculative relationships overlaid; Lauren Lee

McCarthy's 'SOMEONE' (L. L. McCarthy, 2019) goes a step further, instrumenting real houses with publicly accessible control rooms, inviting anyone to become the all-seeing eye. In relation to machine learning, "Believe it yourself" from automata.farm, is a set (Automato.farm, 2018) of objects that can be trained on individual's belief systems, highlighting how subjective biases in today's algorithms are sometimes treated as objective truth, while Elwes' *Zizi* (Elwes, 2019) uses vibrant, flamboyant and fluid digital portraiture to critique the binary approach to gender previously highlighted as a cause of inequalities around digital systems.

1. The Diplomacy of Digital Rights

The transnational nature of the Internet of Things (IoT) and digital platforms has resulted in many complex diplomatic questions and interactions. This section will not focus on what's called "digital diplomacy," that is the use of digital tools to advance an individual country's diplomatic efforts. Many scholars have written on that topic (Hocking & Melissen, 2015), including evaluations of Twitter as a tool for digital diplomacy (Duncombe, Constance, 2018) and quantum theory to quantify its impact (Bjola, 2016), and the EU has articulated its commitment to such initiatives (Council of the EU, 2022). This section will instead focus on the international governance of the internet and Information and Communications Technologies (ICT) in general, as exemplified by key global events since the dawn of the 21st century. Diplomatic efforts related to the internet and digital rights have resulted in both disagreement and collaboration on the international stage, as a wide range of stakeholders have jockeyed over control as well as the appropriate definitions and codifications of human rights in digital spaces.

1.a The Fight for Governance of the Internet

The debate over the governance of the internet crystalized at the World Summit on the Information Society (WSIS), held in Geneva in 2003 and Tunis in 2005, with "a common desire and commitment to build a people-centered, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge...premised on the purposes and principles of the Charter of the United Nations and respecting fully and upholding the Universal Declaration of Human Rights" (World Summit on the Information Society 2003a). Delegates from 175 countries championed the right to internet access, with an agreed-upon Plan of Action to bring internet access to 50% of the

world's population by 2015; global online access was 12% at the time of the first meeting, reaching 40% by the 2015 deadline, and 63% in 2021 (UN International Telecommunication Union, 2022; WSIS, 2003b). Despite achieving consensus on this issue, delegates at the first meeting of the WSIS could not agree on the principal and most controversial agenda item, internet governance. The debate centered on the management of the core technical resources of the internet, as well as internet-related issues like content moderation and spam. The US argued the technical management should remain in the hands of the Internet Corporation for Assigned Names and Numbers (ICANN), a private organization based in the US, while China and the G20 argued that internet management should be addressed by an inter-governmental organization like the UN International Telecommunication Union (ITU); civil society groups favored a decentralized approach (Kleinwächter, 2004). To resolve the issue, the UN established the Working Group on Internet Governance, whose 2005 report offered a number of recommendations for the second WSIS meeting (WGIG, 2005).

While the second phase of the WSIS ultimately could not agree on most of these recommendations, the delegates did agree on one proposal from the WGIG report, the formation of the Internet Governance Forum (IGF), a multistakeholder organization with a mandate to "identify emerging issues, bring them to the attention of the relevant bodies and the general public, and, where appropriate, make recommendations" (WSIS, 2005). A key component in coming to this consensus was that the IGF did not replace existing institutions, like ICANN, and has no direct decision-making authority. Nevertheless, the IGF has enabled dialogue on internet governance between a wider range of stakeholders—including governments, civil society, private industry, and the academic community—on equal, inclusive terms, a shift which redefined "notions of legitimacy and authority…for policy deliberations of complex information systems" (Epstein, 2013). The IGF has also served as a

model for many regional diplomatic efforts regarding internet governance, a proliferation initiated by the East African Community's East Africa Internet Governance Forum (EAIGF), established in 2008. These efforts promote capacity building and knowledge sharing within the region, but struggle to avoid replicating the same power dynamics that prioritize state actors over smaller, less institutionally established stakeholders (Nonnecke, 2016).

While formally committed to digital rights, both the IGF and the WSIS process have struggled to provide anything beyond a framework in which digital rights issues can be discussed. Moreover, by inserting themselves into a key decision-making space about digital rights, both IGF and WSIS have created a highly limited minimum compromise around governance with little space for more robust governance mechanisms (Wagner, 2016).

The IGF and WSIS have not been the only multistakeholder initiatives to address internet governance. In 2014, delegates from 97 countries met in São Paulo, Brazil for NETmundial, representing the interests of governments, civil society, industry, and academia, ultimately publishing a Roadmap for the future of internet governance (NETmundial Multistakeholder Statement, 2014). Later that year, ICANN, the Brazilian Internet Steering Committee (CGIbr), and the World Economic Forum (WEF), with the backing of the US and Brazilian governments, launched the NETmundial Initiative (NMI) for internet governance; this effort was met with widespread criticism because the three organizations established permanent seats for themselves on the 25-member governing council, leading to negative comparisons to the UN Security Council (K. McCarthy, 2014). Additionally, civil society organizations criticized NMI for its lack of transparency, a marked departure from the process and values of the namesake conference, as well as for its potential to supplant the IGF and for its connections to WEF, which were perceived as "an attempt by economic and political elites to

secure a central role in Internet governance" (Malcolm, 2014; Paque, 2014; Pohle, 2015). Ultimately, the partner organizations distanced themselves from the initiative due to the backlash, and it disbanded after eighteen months.

NetMundial should be seen as an attempt to go beyond what was possible at the IGF and WSIS in terms of developing more robust multi-stakeholder governance mechanisms for the Internet (Mueller & Wagner, 2014). Given the institutional configuration of NetMundial, it is difficult to see how the NMI approach could have benefited digital rights. As one of the authors who was involved in extensive negotiations during the NMI can attest, many large corporations seemed to see NMI as an opportunity to limit digital rights and negotiate greater power for large corporations.

1.b Trade as a Battlefield for Digital Rights

Digital rights have also become intertwined with trade negotiations in the digital era. For instance, the Trans-Pacific Partnership (TPP) was a proposed free trade agreement involving 12 Pacific Rim countries—Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States—comprising 40% of global GDP at the time (Fergusson et al., 2015). While this agreement was wide-ranging, it was particularly controversial for its impacts on global intellectual property regulation, such as extending copyright lifespans, expanding technical protection measures against copyright infringement, and developing criminal procedures and penalties for piracy, including criminal liability for aiding and abetting piracy (Lee, 2017; Trans-Pacific Partnership, n.d.).

The TPP also guaranteed that companies would not have to store data in their corresponding markets, a move that the tech industry praised for supporting an open internet architecture,

and digital rights advocates criticized for facilitating the subversion of countries with strong privacy protections (Francis, 2015; Needham, 2016; Walker, 2016). Some advocates argued that these and other measures within TPP would serve a major blow to freedom of expression, the right to privacy, and the right to due process, highlighting the TPP's likelihood to restrict fair use practices, push internet intermediaries to excessively police users, and significantly harm journalists and whistleblowers; further, these groups criticized the closed-door nature of the trade negotiations, most of which took place without public oversight or input (Electronic Frontier Foundation, n.d.; Hepworth, 2015; Rimmer, 2013). After the inauguration of President Trump, the US withdrew from TPP negotiations, and the deal fell apart; some member countries later signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which suspended the aforementioned intellectual property provisions and some other TPP measures in a failed attempt to lure the US back to the table (Fergusson & Williams, 2018; Office of the United States Trade Representative, 2017).

In a similar vein, the transatlantic Trade and Technology Council (TTC) was launched in 2020 as "a forum for the United States and European Union to coordinate approaches to key global trade, economic, and technology issues," but with values-based goals and activities that touch on digital rights, anchored by a working group focused on The Misuse of Technology Threatening Security and Human Rights (European Commission, 2021). The TTC can arguably be seen as an institutionalization of the Brussels effect: the desire for access to the European market has pushed US tech giants to request a GDPR-compatible federal privacy law in the US, and TTC provides a mechanism to ensure interoperability, among other kinds of cooperation (Leswing, 2022; Walker, 2022). Additionally, some analysts see the TTC as an opportunity for international focus on digital sovereignty,

combatting misinformation, and regulatory and standardization measures steered in part by human rights, which have been validated by the stated priorities of the TTC (Barker, 2021; Bendiek & Stürzer, 2022; EPIC, 2021; European Commission, 2022a). However, the TTC has also been criticized for its modest scope and slow progress, particularly regarding the lack of joint efforts to track foreign interference, the unaddressed conflict to TTC goals presented by the 2022 US Inflation Reduction Act, and US concerns about the lack of a coordinated response to the perceived threat of China (Propp, 2022; Scott, 2022; Szczepański, 2023); European Internal Market Commissioner Theirry Breton did not attend the third TTC meeting as a result of some of these tensions (Scott & Lau, 2022).

Digital rights also play a role within China's international economic strategy, shaping part of its extensive diplomatic effort to develop global infrastructure, known as the Belt and Road Initiative (BRI), which has already launched projects in over 100 countries. A subcomponent of the BRI, the Digital Silk Road (DSR), is explicitly focused on digital infrastructure, such as laying fiber optic cables and building data centers, thereby promoting digital access and connectivity across the world; the DSR has also expanded into Europe, with some of the largest economic benefits expected in the Western Balkans (Gruebler, 2021). The DSR has garnered substantial intergovernmental collaboration, including an agreement with the ITU, though some have criticized the lack of co-governance over projects in poorer countries (Sen & Bingqin, 2019). Others are concerned that the DSR will encourage participating countries to adopt technology-enabled authoritarianism inspired by China's use of surveillance and AI technologies, thereby hindering the protection of digital rights (Cheney, 2021; Gyu, 2021; Khalil, 2020).

1.c The Role of the United Nations

The United Nations has articulated its commitment to digital rights numerous times in recent years, with resolutions from the Human Rights Council on the promotion, protection and enjoyment of human rights on the Internet (United Nations, Human Rights Council, 2018), on new and emerging digital technologies and human rights (United Nations, Human Rights Council, 2021), on the right to privacy in the digital age (UN General Assembly, 2019, 2021, 2022), on internet shutdowns (United Nations, Human Rights Council, 2022) and the on facilitation of child sexual exploitation through ICT (United Nations, Human Rights Council, 2016), as well as resolutions by the General Assembly on the right to privacy in the digital age (UN General Assembly, 2020), on the impact of rapid technological change on the achievement of Sustainable Development Goals (United Nations, General Assembly, 2018) and on ICT for sustainable development (United Nations, General Assembly, 2020). The UN Secretary-General's Roadmap for Digital Cooperation also includes a section dedicated to digital human rights, which cites the Guiding Principles on Business and Human Rights as a key starting point and highlights data protection, privacy, digital identity mechanisms, surveillance technologies, and online harassment and violence as target areas moving forward (United Nations Secretary-General, 2020).

Various individual offices within the UN have also addressed digital rights extensively. The UN Special Rapporteur on freedom of opinion and expression has published a number of thematic reports relating to digital rights, including on encryption and anonymity (Kaye, 2015), freedom of expression in the digital age (Kaye, 2016), surveillance (Kaye, 2019a), online hate speech (Kaye, 2019b) and disinformation (Khan, 2021, 2022). Similarly, the UN Special Rapporteur on the right to privacy has published extensively on digital rights, including with respect to gender (Cannataci, 2019), to AI and children (Cannataci, 2021), and

on the handling of data in the wake of the COVID-19 pandemic (Cannataci, 2020; Nougrères, 2022). Finally, the UN Secretary-General also established the UN Envoy on Technology in 2022, whose stated goals address university connectivity, digital capacity building, and digital human rights, among others (United Nations Secretary-General, n.d.-c, n.d.-a, n.d.-b).

In conclusion, the United Nations and in particular the UN special rapporteurs and the Human Rights Council have played a key role in standard setting on digital rights. Beyond that, international debates around digital rights have also been shaped by negotiations around trade such as the TTC and internet governance around the IGF, WSIS and NetMundial. However, these negotiations have had limited impact on digital rights on the ground or digital rights standard setting.

2. Digital Rights and the Law in Africa, India, and Europe

Another key venue in which the politics of digital rights plays out are legal conflicts around digital rights. While it is impossible to list all relevant legal cases that could have been considered, we have instead included a few central cases here that we believe are central for understanding digital rights. These central cases do not typically develop by chance, instead, they are typical examples of strategic litigation. Strategic litigation can act as a mode of correction for inferences in human rights and can act as a tool of digital justice (Cashman & Ginnivan, 2019). This section will give a birds-eye perspective on landmark litigation across different legal systems and digital human rights.

One of the best-known examples in this context is Max Schrems' litigation at the Court of Justice of the European Union (CJEU) looking at European privacy and data protection law. However, we will not just look at privacy and data protection in Europe, but also at three cases from Africa and India. First, Konaté v Burkina Faso and Federation of African Journalists (FAJ) v. The Gambia both are focussed on the right of freedom of expression and freedom of the press, which often stands in contrast to criminalized defamation provisions. These cases were argued in the African Court on Human and Peoples' Rights (ACtHPR) and the Economic Community of West African State's Court of Justice (ECOWAS Court) respectively. Finally, we will look by the litigation case Bhasin v. Union of India, where the litigation centres on internet shutdowns and their effect on digital human rights. A case decided at the Supreme Court of India in its final appeal.

2.a Max Schrems – The Art of Online Platform Litigation

Max Schrem's litigation is often compared to the story of David v Goliath, because of the inequality between the claimant Schrems, who was still a law student at the time and the

globally operating social media giant Facebook, now Meta (Requejo, 2018, p. 7). Several key digital rights decisions have been litigated by him, which are known as, 'Schrems I' and 'Schrems II.' As these decisions have a considerable impact on digital rights, they are discussed here briefly.

Schrems I invalidated the Safe-Harbor agreement, which was an international law instrument regulating data transfer between the EU and the US in a case against the Data Protection Commissioner (DPC) (Schrems v DPC, 2015). Schrems II is referring to the legacy of the Safe-Harbor agreement, the so-called EU-US Privacy Shield, a case in which still the question is asked whether the US can adequately protect EU user data or not (DPC v Facebook Ireland Ltd and Schrems, 2020a). Both Schrems cases clearly centre (Brkan, 2019, p. 864) on the right to privacy and data protection in their litigation (CFREU, 2012, arts. 7 and 8). The initial complaint – Schrems I – was based upon the insufficient protection for Max Scherm's personal data regarding the revelations of Edward Snowden and the PRISM mass surveillance program (Kunelius et al., 2017) of the National Security Agency (NSA) (DPC v Facebook Ireland Ltd and Schrems, 2020a, para. 55).

Schrems II was answering the question of whether standard contractual clauses (SCCs) used by Facebook Irelands to transfer data to the mother company Facebook Inc located in the US could remedy the invalidation of the Safe-Harbor decision (Tracol, 2020). Facebook argued to be in compliance with third-country data transfer rules under European data protection law (GDPR, 2016) by relying on SCCs (Murphy, 2022). The argument brought by Facebook, however, was not shared by the CJEU (DPC v Facebook Ireland Ltd and Schrems, 2020b, paras 169, 174, 178, 186). Rather the court demands proportionality and judicial redress

mechanisms that would adhere to European digital human rights protection standards (CFREU, 2012, arts. 52 and 47).

Regarding both cases, Max Schrems brought to the CJEU and their determination of the incompatibility with EU law standards established in the decisions it might require a third attempt of litigation to finally clarify third-party data transfer in line with digital human rights standards in the future (McLaughlin, 2021; Mildebrath, 2020). After these successful litigation cases, Max Schrems founded the Vienna-based non-profit organization Noyb in 2017, an acronym for “none of your business” (Noyb, 2023), which advocates for a plurality of litigation topics and is still actively fighting for human rights protection (Noyb Projects, 2023).

2.b Landmark legal litigation in Africa

2.b.1 Konaté v. Burkina Faso

Konaté v Burkina Faso is another fascinating litigation example stressing the constant tension between the government and the media. The power relations the two actors are in tension with are however key factors for the protection of the right of freedom of expression. So is the composition of national criminal law provisions against defamation another important factor of digital human rights protection (Lohé Issa Konaté v Burkina Faso, 2014). Lohé Issa Konaté v. Burkina Faso is the first case that discusses freedom of expression before the African Court on Human and Peoples' Rights (ACtHPR) highlighting the historical importance of this litigation example (Eko, 2016).

The African Charta on Human and People's Rights (ACHPR) is a key judicial source of the court's reasoning and is the basis for its existence (Banjul Charter, 1981). Currently, twenty-seven of the fifty-four countries in the African Union are in the court's scope (Duffy, 2015, p. 3). These facts stress the court's position as a strategic litigation goal in Africa and its critical role in protecting human rights.

To provide context to the case, Konaté was the editor-in-chief of L'Ouragan a local newspaper in the country. He published two articles in 2012, mentioning the state prosecutor of Burkina Faso, Placide Nikiéma. Those articles critically pointed out the political actions of Nikiéma emphasised by provoking titles like "Miscarriage of Justice" or "The Prosecutor of Faso – a saboteur of Justice" (Lohé Issa Konaté v Burkina Faso, 2014, para. 156). Because of the two published articles a case was brought against Konaté and the corresponding reporter, claiming to conflict with national criminal defamation law (Lohé Issa Konaté v Burkina Faso, 2014, para. 3,6-8). Their journalistic work and political critique, therefore, led to a year-long custodial sentence and penalties of several thousand dollars.
Furthermore, the newspaper was forced to close for six months and had to publish 'clarification' about the alleged defamation imposed by the national court. Konaté, therefore, saw his human rights infringed by the custodial sentence and the high penalties and sought judicial correction that would also protect other journalists in similar cases (Jansen Reventlow & Adjolohoun, 2018, pp. 4 and 19).

Litigation against the national court decision, therefore, continued before the ACtHPR in its function of protecting individuals in the scope of the African Charta. The constitutional court elaborated on freedom of expression and the differentiation of rights protection for public figures, like Placide Nikiéma, and other individuals, like Lohé Issa Konaté (Lohé Issa Konaté

v Burkina Faso, 2014, para. 155). A differentiation and legal nuance that is mimicked also in contractual law clauses. A day-to-day example of this nuance of the different protection by the right to freedom of expression of public figures and other individuals might be found in the Terms of Service and the behavioral rules that large online platforms include in them. The Facebook Community Standards for example have exemptions for public figures in their definition of "Violence and Incitement" and "Bullying and Harassment" (Tiedeke et al., 2020, pp. 82, 103).

The ACtHPR found that Konaté's human rights had been infringed, and going beyond that, the case constitutes landmark litigation that paved the way for better access to justice and better protection for journalists in Africa concluding with greater protections for freedom of expression. How these significant changes came about will be discussed briefly below:

Protection of journalists: One key detail of Konaté v Burkina Faso is the debate about the connection between human rights protection for journalists, manifested in 'freedom of the press', and the possession of a press card (Lohé Issa Konaté v Burkina Faso, 2014, para. 55). By connecting the scope of human rights protection to the possession of governmental-issued documents, like press cards, negative consequences might emerge. For example, such a need for a press card could lead to chilling effects for professionals in their work or might hinder reporters to investigate at all. With the declaration of the "de facto status of a Journalist", which does not need certification for rewarding human rights protection for professionals, the ACtHPR awarded the claimant and future journalists wider human rights protection in Africa. Konaté's case, therefore, is a good example of a strategic litigation impact and achievement, that has effects that go beyond the protagonists of the case and rather aim for fighting for a

multitude of people for a better level of human rights protection overall (Lohé Issa Konaté v Burkina Faso, 2014, para. 57).

Access to justice: Another central aspect of this particular litigation example was the admissibility of the case (Lohé Issa Konaté v Burkina Faso, 2014, pp. 17–30).

Admissibility and litigation are connected by the aim of reaching a target court (e.g. the ACtHPR), which usually only is able to accept the case, after the exhaustion of all local remedies. Such rules can be found in local laws, in constitutional law e.g. Art 50 of the (Banjul Charter, 1981), or in international law like Art 2 (ICCPR, 1976).

In Konaté's case, the exhaustion of local remedies would have meant that the Cour de Cassation should have been the first litigation attempt, which would have been tested for three legal criteria to examine admissibility: availability, efficiency, and sufficiency of remedies before the court (Lohé Issa Konaté v Burkina Faso, 2014, paras 85–95). The target court in Konaté's case the ACtHPR, however, found sufficient grounds for admissibility. With the acceptance of Konaté's case, the ACtHPR modified access to human rights protection that strategically influences litigation until today.

2.b.2. The Federation of African Journalists v. The Gambia

The Federation of African Journalists (FAJ) and Others v. The Republic of The Gambia is another important landmark litigation example that explicitly points out digital aspects of human rights protection (FAJ v The Gambia, 2018). The main protagonists in FAJ v. The Gambia are five journalists who brought the case to the courts. Several NGOs and Human Rights Organisations across the globe were supporting the litigation attempt. This case illustrates in addition to the previous example, Konaté v Burkina Faso, the risks that may

arise from excessive defamation laws and ‘fake news’ legislation (FAJ v The Gambia, 2018, pp. 33–34).

In contrast to Konaté v Burkina Faso – FAJ v The Gambia targeted a different court – the community ECOWAS Court (Alter et al., 2013; Asare-Afriyie, 2021; Ladan, 2016). The litigation aims in FAJ v The Gambia can be summarized under two main goals: First, targeting the national fake news law in the Gambia and second compensation for the journalist’s suffered harm (Clooney & Webb, 2017, p. 9). To reach those litigation aims the case was supported by several Amici Curiae.

Amici Curiae, or friend of the court, is referring to parties that can bring opinions and external knowledge to a case and are granted certain rights before the court (Mubangizi & Mbazira, 2012, p. 200). Such a position is of special importance for more complex topics for example regarding digital details or understanding. Amici Curiae can then explain the specificities, workings, or means before the court, like e.g. functions of an algorithm. It is however in the power of the court to accept Amici Curiae to the case.

FAJ v The Gambia had the support of a long list of Amici Curiae which include: Amnesty International, Article 19, Canadian Journalists for Free Expression, Committee to Protect Journalists, Freedom House, PEN International, PEN Afrikaans, PEN American Center, PEN Eritrea in Exile, PEN Ghana, PEN Kenya, PEN Nigeria, PEN Sierra Leone, PEN South Africa, Reporters Without Borders, and Right 2 Know Campaign South Africa (Amnesty International et al., 2016).

In contrast to the admitted Amici Curiae in FAJ v The Gambia, only four parties were admitted by the High Court of Ireland in the case of Max Schrems I: The United States of America, the Business Software Alliance, the Electronic Privacy Information Centre and Digital Europe (DPC v Facebook Ireland Ltd and Schrems, 2016). In contrast, in the case of Konaté v Burkina Faso the admitted list of Amici is almost as extensive as in FAJ v The Gambia. It includes Centre for Human Rights, Comite Pour la Protection des Journalistes, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers Union, Pen International and National Pen Centres (Pen Malawi, Pen Algeria, Pen Nigeria, Pen Sierra Leone and Pen South Africa), Southern Africa Litigation Centre and World Association of Newspapers and News Publishers (Lohé Issa Konaté v Burkina Faso, 2014, pp. 7–8).

Similarly, as in the Konaté v Burkina Faso, the right to freedom of expression and freedom of the press were the basis for the strategic legal litigation grounds for the FAJ. Additionally, the case included claims against Art 12 of the ACHPR to cover the journalists' infringements from experiencing torture. The harms the five journalists had to experience reached, from infringements on their bodily integrity, the abuse of power in captivity, the long-term effects such treatment has on humans, to the impossibility for journalists to return to their country and to proceed with their jobs and continue working and reporting (FAJ v The Gambia, 2018, pp. 4, 11, 48, 57–60).

The ECOWAS Court agreed with the FAJ and decided that The Gambia had infringed on the journalist's rights “to freedom of expression and torture” (FAJ v The Gambia, 2018, p. 60). The court found that the Criminal Code of the Gambia created a chilling effect that “unduly restrict[s] the exercise of freedom of expression,” (FAJ v The Gambia, 2018, p. 47). Furthermore, the treatment of the journalists was classified by the ECOWAS Court as

inhuman. The journalists, therefore, were infringed on their right to liberty and security (FAJ v The Gambia, 2018, pp. 55, 60). FAJ v The Gambia reached therefore the set litigation goals and connects the link between analogue manifestations of digital human rights and digital aspects and elements shaping strategic litigation and human expression.

2.c Access to the Internet as a Digital Fundamental Right in India?

The case Bhasin v. Union of India illustrates the importance of access to the internet as a timely way to exercise protected freedoms online (Bhasin v. Union of India, 2020). The court highlights the relevance of access to the internet as an "integral part" of the right to freedom of expression and grants the internet the status of being constitutionally protected (Bhasin v. Union of India, 2020, p. 28).

Imposing an internet shutdown in a region might act as an instantly imposed chilling effect on digital forms of speech and could influence the local people who suffer the consequences of such a political decision in various ways regarding their human rights protection. Bhasin v. Union of India goes a step further and is asking the question of whether unlimited internet shutdowns are still constitutional or are already overstepping the borders of digital human rights protection.

Governments can use internet shutdowns as a form of repression (Bhardwaj et al., 2020; Momen et al., 2020), which was the argument Anuradha Bhasin and Ghulam Nabi Azad expressed for the indefinitely imposed shutdown of the internet in the regions Jammu and Kashmir (Bhasin v. Union of India, 2020, pp. 5–6). However, the internet shutdown was accompanied by further restrictions on telecommunication, the limitation of free movement,

public gatherings, or limits on the opening of educational institutions. These limitations started on the 4th of August 2019 in both regions (Bhasin v. Union of India, 2020, pp. 4–5).

Jammu and Kashmir enjoyed a special regional status according to Art 370 of the Indian Constitution: From this special protection however were the two regions relieved, by the issuance of the constitutional order 272 on August 5th of the same year (Momen et al., 2020). The shutdown lasted for more than 100 days and heavily touched upon the digital rights of local individuals (Firdosi, 2020; Gupta & Kumar, 2020; Hassan, 2022). India's Supreme Court, therefore, tested the principle of proportionality, which is a part of the elementary test for governmental interventions in constitutional law, on the communication restrictions enacted in Jammu and Kashmir (Bhasin v. Union of India, 2020, p. 28). According to the court, "Suspension [of the access to the internet] can be utilized for the temporary duration only" (Bhasin v. Union of India, 2020, p. 128). This litigation case limits the future capacities of governmental interferences regarding access to the internet in unlimited forms and therefore actively shapes human rights protection.

Additionally, Bhasin v. Union of India provides more transparency for rightsholders regarding internet shutdowns. The court finds that competent authorities must publish all orders that impose restrictions on telecommunication, including the internet and are subject to judicial review (Bhasin v. Union of India, 2020, pp. 127–128). Publishing such information can help future litigation attempts to find strategically useful cases to bring to court.

4. Conclusion: Common Challenges for Digital Rights?

How will the politics of digital rights develop in the coming years? As digital technologies insinuate themselves ever deeper and more subtly into individual and social experience, questions of how they support or undermine digital human rights are urgent. With easy-to-use AI programs like ChatGPT influencing labour markets and concentrating power with corporations, and attempts to develop of online realities like the Metaverse as a replacement for existing social practices, designers play a crucial role in how these tools and technologies become embedded into the everyday life of people. The design of these systems is a component in whether or not they are able to enhance or erode the digital rights of citizens. There is a high level of concern about how AI technology might enhance and further challenge human rights, exacerbating existing biases and oppression, increasing structural issues of sexism, racism (Costanza-Chock, S. (2020).), and ableism (Shew, 2020). There is a need to develop and use design methods and approaches that can ensure that the digital products not just follow regulations but are active support for digital human rights in the future.

When looking at the politics of digital rights across all aspects of diplomacy, law and design discussed in this article, a few key themes emerge. **The first theme related to new groups of stakeholders involved in the digital rights negotiating process**. Both the civil society and the design justice movement have embraced new actors and constellations called for a broader integration of actors involved in deciding what digital rights are and how they are negotiated. The politics of digital rights give voice to individuals who would previously not have a voice at that level, whether these are students, designers or marginalised groups. The institutions negotiating digital rights have at least the potential to allow these voices to be

heard and integrating in decision-making, acting as a check on the power of overly majoritarian decision-making.

The **second theme relates to the 'old' venues in which digital rights are negotiated**, which too a considerable extent discussed here are 'old' venues well familiar to individuals studying human rights more broadly. It is fascinating that – perhaps contrary to what might be expected of technology-related governance (Wagner 2016) – much of the negotiation of digital rights takes place in more traditional venues of national and regional courts, parliaments or the UN Human Rights Council. While the designers of new technologies certainly do play in influencing the everyday implementation of digital rights, it is ultimately around many of the 'old' institutions that many key digital rights conflicts are fought and then either won or lost. It could also be argued that decades of relatively unfettered technological development, the technology sector is encountering an increasing degree of regulatory oversight, which has the potential to bring enormous benefits or enormous problems for digital rights.

The **third theme relates to which digital rights that are negotiated**. Without question, the central themes around which the politics of digital rights play out are Privacy and Freedom of Expression. The focus on these two rights can obscure the many other issues around digital rights that are also critically important but seldom associated with digital technologies, whether these are freedom of assembly, freedom of thought or indeed social and cultural rights. As digital technologies are increasingly deeply embedded in societies across the world, it is likely that broader understandings of digital rights beyond privacy and freedom of expression will become more normal than they are at present.

What runs across all three of these themes is a shifting understanding of what digital rights is and should be. Whether designers, lawyers, diplomats, or judges are all pushing at the boundaries of what we understand as digital rights, broadening the concept and making it more accessible to a wider audience. With this article, we hope to contribute to the debate around what digital rights and could be in future. We hope that this article has been able to provide some conceptual clarity on the different perspectives around digital (human) rights and how the concept is evolving over time.

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