



Gone But Not Forgotten

Legal scholar Jasmin Wenersbusch uses human rights theory and private international law to reclaim human rights in cyberspace



We all want to be remembered, unless it's for something we'd rather forget. In the past, one's transgressions — bankruptcy, fraud, infidelity, even murder — might have been recorded in newspapers and then quietly, over the years, slipped into archive obscurity. Then came the limitless memory of cyberspace. Jasmin Wenersbusch, an Azrieli Graduate Studies Fellow and PhD candidate in the Buchmann Faculty of Law at Tel Aviv University, whose research examines extraterritorial human rights protection on the internet through the lens of human rights theory and conflict of laws, finds herself pondering old concepts in a contemporary context: is it possible to be the author of one's own life story, or to erase it and start again, in a borderless realm? Wenersbusch, who holds a Doctor of Law degree from the University of Düsseldorf as well as an LL.M. in International Law from the University of Cambridge, answers yes, but with a caveat: only if states cooperate to protect those rights and push back against Google and Facebook's new world order.

When we think about the internet and human rights, some of the first things that come to mind are freedom of speech, information and privacy, as well as the perceived internationality of a network that's not defined by geographical boundaries. Even though human rights are based on universal values, they developed in different regions and have been shaped by diverging cultural and legal values. Freedom of speech and privacy, for example, are interpreted differently in various countries. So what does it mean to have a right to free speech on the internet? What are the appropriate standards for privacy and data protection? What is the role of states in this context and how does this interfere with internet companies and other countries? This is where my research starts.

Designed in the aftermath of World War II, our international legal order was created to limit conflict. It placed the state at its very centre, rejecting the



idea of an ultimate political authority by limiting power to the sovereign territory of each state. Distributing power like this carries the risk that states will abuse their power and harm those subject to it. According to political and legal theories of human rights, human rights are supposed to protect individual interests by setting limits to state sovereignty. On the isolated island of its own territory, a state is — or has been — both the main guardian and violator of its citizens' rights.

The internet challenges this paradigm in several ways. It not only provides an international arena that's designed to overcome territorial boundaries but has also enabled the emergence of powerful intermediaries like Facebook and Google. This puts the role of states to a serious test. Constrained by traditional jurisdictional principles, states have much less ability to prevent human rights impairments rooted in transnational data flows and the autonomy of non-state internet actors. The first stage of my research reviews the underlying rationales of our human rights regime. The next step explores whether and to what extent the internet has changed the way we need to think about territoriality in the context of human rights.

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We all talk about how the internet is universal, but this is not entirely true. Online content is tailored to the language, cultural preferences and domestic laws of your region. In Israel, I probably see fewer advertisements for umbrellas than I would see in Europe. On YouTube, the accessibility of content diverges in the various countries due to copyright restrictions. In Europe, hate speech is removed from social media platforms almost instantly, whereas in the United States, the same or similar content is likely to remain accessible. This is what makes cyberspace territorial.

Our online activities, however, are *not* territorial. When we post something on Twitter or upload a new website, the content will be immediately accessible around the world and may generate conflicts in other countries. There is a disconnect between our expectations — which are rooted in the place we come from — and the borderless nature of our actions on the internet.

In Europe, where privacy is highly valued, the so-called "right to be forgotten" has emerged. If, after a while, there's no real public interest in preserving a piece of private information about a person that pops up in internet searches, they have a right to have it removed from Google and other directories. But in the U.S. and any other country that doesn't recognize this right, the information would still appear even though, in today's globalized world, someone who wants this data removed would probably want it de-listed everywhere. Do they have a right to make such a request? In other countries such deletion may run contrary to an individual's right to information. Whose interest should prevail? How can we resolve this conflict? This is the tension I'm examining and attempting to address.

Conflicts among diverging domestic laws are nothing new and have long been regulated by private international law, which I am drawing on to try to resolve conflicting human rights laws online. Private international law is all about determining the prevailing interest, with an increasing focus on the affected parties and their respective wills, while also considering fundamentally diverging values and public policies. It appears that clashes between contradicting interpretations of human rights online are not that different. What we might need is collaboration across states: a recognition of the fact that no state is capable of fully protecting its citizens' rights on the internet unless cooperation is achieved.

For now, the legal uncertainties as to how human rights should and could be protected online have provided internet companies with considerable power. They decide whether and to what extent to comply with a request for de-listing. Given that their main interest is to grow and earn profits, this decision is unlikely to be informed by human rights concerns.

Everybody should care about this. The internet is everywhere and deeply intertwined with our lives, but we don't yet know the ramifications. People tend to think Facebook is free. It's not. The price and currency of all these platforms is our data. That data is not just out there, but affects us and how other people see us — today and tomorrow. At some point, it's no longer us but the data that writes our life stories. The many positive changes brought about by new technology almost always have a flip side. We should care about our rights and make our concerns heard, online and offline.

Doing theoretical research in the humanities entails contributing to an ongoing thinking process. It's many voices together, writing about similar topics and engaging with each other, that may make a difference in the long run. I would like people in this field to read my work, to engage with my ideas and integrate them with their own. If this helps us find a solution, if it inspires and encourages people, I will be very happy. ▲●■