

Contents

<i>Acknowledgements</i>	<i>page xiii</i>
<b>Introduction: The Distorted Image</b>	<b>1</b>
PART I THE CONTEXTUAL CHALLENGES AND PURPOSE OF THE NON-COHERENCE THEORY OF DIGITAL HUMAN RIGHTS	
<b>1 Horizontal and Vertical Governance Models and Normativity</b>	<b>7</b>
1.1 The Idea of Non-coherence and Potential Objections	7
1.2 Three Scenarios of the Transposition of Governance Models	9
1.3 The Inadequacy of Protection Thesis	11
1.4 Normative Transposition <i>Carte Blanche</i> and Rhetorical Functionality	13
1.5 The Multistakeholderism Veil Thesis	16
<b>2 The Ontological Dimension: Reflections on Distorted Images and Normative Fragmentation</b>	<b>20</b>
2.1 Some Observations on the Focus	20
2.2 Reflections of Offline Justifications Online	22
2.2.1 Religious Justification	22
2.2.2 Biological Justification	24
2.2.3 Intuitionistic Model	25
2.2.4 Consensual Model	28
2.2.5 Instrumentalist Approach	30
2.2.6 Cultural Justification	32
2.2.7 Explicative Justification	34
2.2.8 Existentialist Justification	38

<b>3</b>	<b>The Epistemic Dimension: Rhetoric by and Recognition of Multiple Actors</b>	<b>40</b>
3.1	The Context	40
3.2	The Process of Knowledge Creation and Normative Validity	41
3.2.1	The Digital Domain's Interest in Normative Validity	42
3.2.2	Variance in the Meaning of Normative Validity	45
<b>4</b>	<b>On the Controversy about the Relative Weight of Rights</b>	<b>47</b>
4.1	Inherent Division into Absolute and Relative Rights	47
4.2	The Randomisation of the Division	49
4.2.1	The Randomisation of the Weight of the Freedom of Expression Online	49
4.2.2	The Randomisation of the Weight of the Right to Privacy Online	50
4.3	The Thesis of Relative Absoluteness	51
4.3.1	The Assumption of a Multilayered Rights Structure	51
4.4	The Idea of Digital Dignity	52
4.5	The Relativisation of the Core Value Thesis	54
<b>5</b>	<b>Constitutional Entitlements to Human Rights in the Digital Domain</b>	<b>57</b>
5.1	About the Origin of Online Constitutional Ideas	57
5.2	About Digital Constitutionalism	58
5.2.1	The Inadequacy of Protection Thesis regarding Constitutional-Level Norms	58
5.2.2	The Promise of Digital Constitutionalism	60
5.3	The Search for New Online Constitutional Principles	62
5.3.1	The United Nations Human Rights Council Resolutions	63
5.3.2	The EU Digital Rights Declaration	63
5.4	Looking at Some Digital Constitutions	64
5.4.1	The Italian Declaration of Internet Rights	65
5.4.2	The Spanish Charter of Digital Rights	67
5.4.3	The African Declaration on Internet Rights and Freedoms and the Brazilian Internet Bill	69
5.5	Short Concluding Remarks	69

PART II REFLECTIONS ON SOME THEORIES AND DOCTRINES

<b>6</b>	<b>The Doctrine of the Sameness of Rights Online and Offline</b>	<b>73</b>
6.1	Contours of the Idea	73
6.2	The Maturation of the Idea	74
6.3	Doubts about the Sameness Doctrine	76
6.3.1	The Doubt Arising from Generality	76
6.3.2	The Doubt from Mistaking Content for Enforcement	79
<b>7</b>	<b>Claims of New Internet-Specific Human Rights</b>	<b>80</b>
7.1	Three Theoretical Frameworks	80
7.2	Hart’s Secondary and Primary Rules	81
7.2.1	The First Defect: Uncertainty	83
7.2.2	The Second Defect: Staticity	84
7.2.3	The Third Defect: Inefficiency	86
7.2.4	About Meta’s Community Standards	86
7.2.5	The Weakness of Connection Thesis	88
7.3	The Decrease in Universality and Abstractness Thesis	89
7.3.1	The Main Concepts	89
7.3.2	Review of Some Instruments under the Thesis	90
7.3.3	Decreasing Abstractness and Universality Online	93
7.4	Alston’s Quality Control Approach	95
<b>8</b>	<b>The Capabilities Approach</b>	<b>96</b>
8.1	The Context	96
8.2	The Problem of Normative Standards Dependency on Capabilities	97
8.3	Reasonability of Normative Construction	98
<b>9</b>	<b>The Frankfurt School and the Normative Order of the Internet</b>	<b>101</b>
9.1	The Achilles’ Heel	101
9.2	The Legitimizing Function of Normative Systems	102
9.3	The Legitimation of Normative Systems	104
<b>10</b>	<b>The Articulation and Critical Review of Self-Normativity</b>	<b>108</b>
10.1	A Simple Mathematical Explanation	108
10.2	More Complex Explanations	108
10.2.1	Heterarchy and Self-Normativity	110
10.2.2	Isolationism and Self-Normativity	112
10.2.3	Self-Normativity and the Moral Dimension	114

viii	<i>Contents</i>	
	10.2.4 Relativism and Self-Normativity	116
	10.2.5 In Summary	118
11	<b>The Transversality Principle (Teubner)</b>	121
	11.1 Challenge against Idealism	121
	11.2 Anything Goes	123
12	<b>Network Society Approach (Castells)</b>	125
	12.1 The Mutual Benefit Assumption Thesis	125
	12.2 The Main Objection	126
	12.3 Variance in Main Features	127
	12.3.1 Permeability	127
	12.3.2 The Supportive Purpose of Vertical Normative Structures	128
	12.3.3 Increased Social Responsibility	129
	12.3.4 Obscuring Effect on Legitimacy	129
	12.3.5 Reliance on Trust	130
	PART III THE CORE ELEMENTS OF THE NON-COHERENCE THEORY	
13	<b>Doctrinal Changes in Scope and the Meaning of Human Rights</b>	135
	13.1 The Context for Entanglement	135
	13.2 The Equilibrium of Relative Rights Thesis	135
	13.3 The Right to Privacy	139
	13.3.1 The Exit and Entry into Privacies	139
	13.3.2 The Argument from Interest Theory	140
	13.3.3 The Interest in Being Left Alone	141
	13.3.4 The Obscurity of the Digital Privacy Image	142
	13.3.5 Redefining Online Privacy: The Dual Nature	145
	13.3.6 Privacy and Digital Identity	146
	13.3.7 Brief Summary Notes on Privacy	148
	13.4 Freedom of Expression Online	149
	13.4.1 Positivity and Negativity in Transposition	149
	13.4.2 Business as Usual and Anything Goes	151
	13.4.3 The Comfort in the Non-coherence Thesis	153
	13.4.4 Censorship Online	155
	13.4.5 The Distinction between Good and Evil Speech	161

	<i>Contents</i>	ix
<b>14</b>	<b>The Variance Principle and Digital Transparency</b>	165
14.1	Remembering Bentham	166
14.2	Objection from Non-specificity	167
14.3	About Digital Happiness	168
14.4	Some Specifics of Digital Transparency: Rules and Reasoning	171
14.5	Towards an Online-Specific Meaning of Transparency	172
14.6	Han's "Transparency Society" Image Online	176
<b>15</b>	<b>Legal Certainty and Uncertainty</b>	179
15.1	The Connecting Functionality	179
15.2	Legal Certainty and the Basic Norm	180
15.2.1	The Expectation of Interrelationship	180
15.2.2	Variance in Meanings	183
15.2.3	Legal and Social Uncertainties	184
15.3	Legal Certainty and Justice	185
15.3.1	The Argument from Limits to Relativism	185
15.3.2	Legal Certainty <i>Contra</i> Justice	186
15.4	The Problem from Argumentation	188
15.4.1	On Practicality	188
15.4.2	On Predictability	188
15.5	Five Paradoxes	191
15.6	Legal Certainty and Digital Predictability in Some Instruments	193
<b>16</b>	<b>On Foreseeability and Non-foreseeability</b>	196
16.1	On Positivity and Negativity	196
16.2	On an Average Person's Comprehension	197
16.3	Degrees of Foreseeability	198
16.3.1	A Low Degree of Foreseeability	199
16.3.2	A High Degree of Foreseeability	201
16.4	The Uncomfortable Consequence of Non-coherence	201
<b>17</b>	<b>Reflections from the Academic Debate</b>	203
17.1	The Acknowledgement of Contributions	203
17.2	Ideas Related to the Distinctness of Human Rights Online	204

17.3	Ideas Related to the Divide between the Offline and Online Domains	205
17.3.1	Comments Related to Ontology	205
17.3.2	Comments Related to Observations from Practice	206
17.4	Ideas and Challenges Related to Artificial Intelligence	208
17.5	Ideas and Challenges Related to Digital Literacy	209
17.6	Digital Human Rights and Ethical Standards	210
17.7	Short Concluding Remarks from Academic Discourse	211
PART IV THE IMPACT OF THE NON-COHERENCE THEORY		
18	<b>The E-state and Fundamental Rights</b>	215
18.1	The Contours of Positivity and Negativity	215
18.1.1	The Objection from Obscurity	215
18.1.2	The Objection from Distrust	216
18.2	The Four Caveats	218
18.2.1	The First Caveat: The Dominance of Human Rights Rhetoric	218
18.2.2	The Second Caveat: Is the E-state a Success?	220
18.2.3	The Third Caveat: The Expectation of Horizontality	221
18.2.4	The Fourth Caveat: The Road to a Police State	224
19	<b>Proportionality Deficit Paradox</b>	225
19.1	Ideas Develop during a Crisis	225
19.2	Concerns about Online Balancing	226
19.3	Proportionality and Blockchain Technologies	228
19.4	Proportionality as We Know It	229
20	<b>Automated Systems and Artificial Intelligence</b>	232
20.1	The Main Properties	232
20.2	Trust in AI	232
20.2.1	The Dual Nature	232
20.2.2	Intolerability and Disavowal Formulas Online	233
20.2.3	Quantitative Input	234
20.2.4	Recourse to Martens	236
20.2.5	Recourse to Plato	236
20.2.6	AI and the Basic Norm	237
20.2.7	Digital Normativity without Basic Norms	238

<i>Contents</i>	<i>xi</i>
20.3 Robustness and AI	242
20.3.1 Robust AI Law	242
20.3.2 Robustness of the Digital Domain <i>Per Se</i>	245
PART V INTERNET BALANCING FORMULA	
<b>21 The Internet Balancing Formula</b>	249
21.1 Introductory Notes	249
21.2 The Internet Balancing Formula	254
21.2.1 Assumptions	254
21.2.2 The Right to Privacy	255
21.2.3 Freedom of Expression	257
21.2.4 The Aspect of Empathy	260
21.2.5 The Formula	260
21.2.6 The Interest in Historical Truth	261
21.3 Testing the Internet Balancing Formula	261
21.3.1 The Delfi Case	262
21.3.2 Egill Einarsson Case	263
21.3.3 Hypothetical Case of Fatally Ill Prime Minister Admitting the Country Will Go Bankrupt Soon	264
21.3.4 Case of Who Would Be the New Authoritarian Leader?	265
21.4 Interim Conclusion	266
<b>22 Robert Alexy's Views on the Internet Balancing Formula</b>	267
22.1 The Weight Formula	268
22.2 Internet Balancing Formula and Weight Formula	271
22.2.1 IBF	271
22.2.2 V(1): Internet Vulnerability	272
22.2.3 PR(x): Interference into Privacy	274
22.2.4 T(y): Element of Time	274
22.2.5 E(z): Element of Empathy	275
22.2.6 The Elements on the Side of Freedom of Expression	276
<b>23 Reply to Alexy Critique</b>	278
23.1 Internet Vulnerability	278
23.2 The Problem of Abstract Weight	279
23.3 Revised Internet Balancing Formula Containing the Element of Weight	281

xii	<i>Contents</i>	
	23.4 The Concretisation Thesis	283
	23.5 The Element of Empathy	284
24	<b>The Debate</b>	286
	24.1 The Legitimacy Deficit	286
	24.2 Reflections on the Internet Balancing Formula Debate	288
	<b><i>In Lieu of the Concluding Remarks: The Trailer for the Monograph</i></b>	293
	<i>Index</i>	311