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# Ranking Digital Rights:
# Human Rights, the Internet and the Fifth Estate

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*In the twenty-first century, many of the most acute political and geopolitical struggles will involve access to and control of information.*

*— Rebecca MacKinnon (Consent of the Networked, 2012)*

In this essay, I will use the example of a new human rights advocacy project, Ranking Digital Rights, as the basis for a broader discussion of civil society activism, the new global public sphere and the protection of human rights in the 21st century. This article is part of a broader research agenda in which I consider the rapid evolution of norms governing access to and control of information that I believe characterizes the beginning of the 21st century. Conceptually, Ranking Digital Rights represents the convergence of several important themes: business and human rights, the Internet freedom agenda, and the Fifth Estate. In my discussion I will touch on each of these themes in turn before offering a few suggestions for researchers and activists.

## Ranking Digital Rights

Ranking Digital Rights was born of the realization that the new global public sphere is mediated by powerful information and communication technology (ICT) companies. This is a significant departure from the era of newspapers, newsmagazines, and broadcasting, when editorial decisions were made by journalists and editors who, in spite of their own agendas and prejudices, were broadly committed to the ideal of a free press supporting an informed citizenry. In contrast, ICT firms are governed by the laws of technical efficiency and profit, and are led by managers whose technical and business expertise has not prepared them for their role as de facto gatekeepers of information. Moreover, 21st century information controls are largely invisible, and invasions of privacy are undetectable by the lay citizen. Finally, replacing human monitors with technology allows mass surveillance on an unprecedented scale. The goal of Ranking

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Digital Rights is to illuminate this dynamic by ranking the world's leading ICT firms according to their respect for established international human rights standards, notably privacy and freedom of expression.[2]

This project represents a new approach to human rights advocacy in several respects. First, its unit of analysis is the private sector company, and not the nation-state or even the individual. Second, though grounded in international human rights law, the project does not employ lawyers, nor does its theory of change call for lawsuits or pushing for legislative change directly. Third, it embraces principles of corporate governance such as investor activism and the use of external auditors rather than ignoring or even working against the reality of global capitalism. Its approach is pragmatic, focused on the "low-hanging fruit" that can improve conditions for the greatest number of people in the shortest possible time, without claiming to change macro conditions like China's totalitarian approach to media and communication or the neoliberal capitalist system that undeniably perpetuates global inequality (Piketty, 2014). Rather, the project envisions a world where individuals are better able to advocate for laws and policies that impact them, and works toward that vision by supporting privacy and free expression wherever possible.

## Human Rights and the ICT Sector

The potential benefits and risks posed to human rights by the spread of Internet-related technologies have been clear since at least the 1990s. The use of information and communication technology to document human rights abuses, analyze data, disseminate the resulting analysis, and coordinate large-scale advocacy efforts has been well documented, yet "technology is a neutral tool that can be used just as much to violate human rights as to promote them" (Metzl, 1996, p. 6). Human rights groups that use electronic means of communication expose themselves to the possibility of surveillance, and a public sphere that relies on technical infrastructure under the physical control of governments is vulnerable not only to government monitoring but also to censorship and the exclusion of specific groups or individuals from participation in public life (Ball, Girouard, & Chapman, 1997; Deibert, 2013; Habermas, 1991; MacKinnon, 2012; Metzl, 1996; Morozov, 2011).

The rights enumerated in the Universal Declaration of Human Rights are indivisible and interdependent; weakening the protections of any one of these rights weakens the others as well (Minkler & Sweeney, 2011). The rights to privacy and to freedom of expression are uniquely vulnerable to ICT innovations: The easier it is to collect, analyze and share data points about a person, and the easier it is to monitor that person's communications (both the content and so-called "metadata"), the lower the barriers for discrimination, retribution, and persecution by state and non-state actors. Likewise, information-control tools such as deep packet inspection, bandwidth-throttling, and keyword-based filters have the potential to prevent citizens from accessing and disseminating information that may be key to the enjoyment and defense of other basic rights. China's Great Firewall is perhaps the most prominent

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[2] The project's ranking methodology is outside the scope of this commentary. It is available at http://www.rankingdigitalrights.org, or by contacting the author.

example of this censorship, but human rights and civil liberties are at risk everywhere, online and off (Deibert, 2013; MacKinnon, 2012; Morozov, 2011).

**Internet Freedom and the Fifth Estate**

So what can the international community do to protect and advance digital rights? Previous eras of human rights struggle (including labor rights and women's rights) have involved coordination by global organizations affiliated with the United Nations system (the International Labor Organization, UN Women). In contrast, Ranking Digital Rights operates within a growing ecology of civil society organizations whose goal is to safeguard the rights to privacy and free expression in the context of rapid technological change and contested norms governing access to and control of information—what many (including the U.S. State Department) call the Internet freedom agenda (Meinrath & Pickard, 2008; Shirky, 2011).

Just as the Internet itself is more robust for lacking a "central 'nerve center'" whose destruction or contamination would jeopardize the whole system (Metzl, 1996, p. 3), regulation of the global public sphere (including the media broadly defined and its corporate structure) will be more effective and more impervious to disruption if it eschews centralized organization.

The Fifth Estate is the ecology of "networked individuals" (Dutton, 2009, p. 3) who utilize Web-enabled information communication technologies to "increase the accountability of other Estates, for instance by challenging government policies and Fourth Estate sources" (ibid., p. 23). The concept is closely linked to the "media of mass self-communication" described by Castells (2007, p. 9). The notion of an ecology is key to the vision of the Fifth Estate endorsed by Dutton and Castells: Oversight responsibility is distributed across the network, without any single node dominating the rest. While he doesn't use the term "Fifth Estate," Clay Shirky also espouses an "environmental view" of Internet freedom, emphasizing the mismatch between the assumptions guiding external efforts to promote Internet freedom within a society and the "local conditions of dissent" (Shirky, 2011, pp. 4–5). As we have seen in Egypt and Ukraine, to name just two examples, association with American or Western groups "runs the risk of tainting even peaceful opposition as being directed by foreign elements" (ibid., p. 4 ) Political activists may well use information and communication technologies to further their aims—it is hard to imagine that they would not—but the impetus, strategy, and discourse must come from within civil society.

> According to this conception, positive changes in the life of a country, including pro-democratic regime change, follow, rather than precede, the development of a strong public sphere. … A slowly developing public sphere, where public opinion relies on both media and conversation, is the core of the environmental view of Internet freedom. As opposed to the self-aggrandizing view that the West holds the source code for democracy—and if it were only made accessible, the remaining autocratic states would crumble—the environmental view assumes that little political change happens without the dissemination and adoption of ideas and opinions in the public sphere. (Shirky, 2011, p. 6)

Thus, for Shirky, the best thing the U.S. State Department can do for the Internet freedom agenda is to stay out of it as much as possible and allow networked civil society actors—the Fifth Estate—to push for progress. But that requires a level playing field, and that is far from a foregone conclusion.

If media is "the social space" where power ("the structural capacity of a social actor to impose its will over other social actor(s)") confronts counter-power ("the capacity by social actors to challenge and eventually change the power relations institutionalized in society"), then control over the battlefield itself is the defining struggle between the individual and the state, between authority and human rights (Castells, 2007, p. 2). Today, that battlefield is online, where ICT sector companies are sovereign (MacKinnon, 2012). Governments can and do exert power over these "sovereigns of cyberspace" through their own sovereignty over physical space, monopoly on legitimate violence, ability to legislate and tax, and other attributes (Weber, 1965). Civil society oversight efforts like Ranking Digital Rights seek to counter state influence over the ICT sector precisely so that the Internet can remain a neutral forum for deliberation and debate.

The line between power and counter-power, in this context, can seem fuzzy and ill-defined, particularly when Fifth Estate actors couch their objectives in terms of international human rights law, which derives its legitimacy from the international system and thus from states themselves. But states in turn derive their own legitimacy from the consent of the governed, and the international human rights framework owes as much to civil society as it does to its governmental signatories.

Issuing rankings or scorecards is a common activity among these groups. But how effective are these exercises at promoting Internet freedom and human rights? The fact that foundations like MacArthur, Ford, and Open Society continue to fund new and existing rankings projects suggests that, at the very least, the donor elites who often set the civil society agenda believe that such rankings are effective at changing the behavior of the actors being ranked, be they countries, companies, or other entities.

### Human Rights Indicators as Change Agents

In 2001, international human rights lawyer and advocate Maria Green published a "state of the field" paper on human rights indicators. Considering social, economic, and cultural rights as well as civil and political rights, Green noted that indicators were widely used to measure both compliance processes and enjoyment outputs related to both categories of rights by governments, international organizations, and civil society, with all three of the aforementioned actor categories contributing to the creation of these indicators. Moreover, "when indices' methodology is not entirely transparent, they risk accusations or the reality of bias. (For instance, the Freedom House index seems frequently to have been accused of a bias against reflecting human rights violations in non-communist countries.)" And finally, assigning a rank order or numerical score based on highly complex, qualitative data requires a degree of simplification that some critics believe renders the resulting index nearly meaningless (Green, 2001, p. 1082).

Green defines a human rights indicator as "a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation. The assumption is that a 'human rights

indicator' must be pegged to specific rights and obligations under national or international law" (2001, p. 1065). In the human rights community more broadly, the term "indicators" is used both as a synonym for "statistics" and to cover "any information relevant to the observance or enjoyment of a specific right" (ibid., p. 1077). Many such indicators assess "the existence of legislation or other specific legal policies" and may focus on measuring "willingness" of governments to respect and protect human rights at the expense of measuring their "capacity" to do so (ibid., p. 1080).

Indices like Ranking Digital Rights are "rating scales based on expert knowledge and judgment"[3] that "rely on composite information and their main purpose appears to be to provide a comparative means of ranking governments [or other actors] by performance." Green (2001, p. 1082) notes that such indices are often criticized for "reflecting the concerns of the index compilers rather than a value-neutral interpretation" and for often lacking a clear connection to a specific human rights norm. (For a more recent discussion of these critiques, see Brooten, 2013, and Giannone, 2010.)

Green's study did not, however, attempt to measure the effectiveness of publishing indicators or rankings—ordered sets of indicators—in terms of achieving a specific goal. One measure of success for these projects is whether or not they continue to receive funding, which depends on submitting regular grant reports to funding organizations as well as applications for grant renewals. The purpose of these narratives is to convince funders that their money was well spent and that continued expenditures will advance the cause that they are supporting. Central to this effort is the *theory of change*, which can be understood as a process map linking an organization's desired social change back to its specific, concrete activities (Brest, 2010; Clark & Taplin, 2012).

The Ranking Digital Rights theory of change is complex, as the process map below demonstrates (see Figure 1). On a basic level, RDR relies on spotlighting poor performers to induce them to improve before the next iteration of the ranking, while rewarding high performers with positive media attention. By giving companies concrete steps to improve, RDR will make it easier for companies to take the recommended actions than if they were expected to come up with the answers on their own. Just as importantly, individuals will be able to use the rankings in choosing which products and services to use. In turn, companies will be incentivized to improve their ranking to compete for customers. Likewise, investors will be able to discern between companies that pay lip service to corporate social responsibility and those that actually respect privacy and free expression rights. Investor activism has proven to be a powerful agent for change, starting with divestment in the apartheid era. Prominent socially responsible investor Bennett Freeman has testified before numerous government bodies about the impact that he and other investors have had in pushing companies to adhere to rights-respecting standards with regards to child labor, forced labor, conflict minerals, Darfur, and other serious human rights concerns (Freeman, 2007, 2010, 2011, 2014).

Exposing the specific areas where a given company is lacking will inform the company-oriented advocacy strategies of consumer-protection and human-rights groups operating at the national level.

Being able to compare a target company with its indicators can be a powerful argument in negotiation, especially if the comparison is unfavorable.

By identifying the legal impediments to progress, Ranking Digital Rights will also provide specific feedback to lawmakers who in many cases will be sufficiently motivated by the prospect of their national champions losing their competitive edge against foreign competitors who are able to more fully respect privacy and free expression rights. Civil society organizations as well as companies themselves will likewise be able to target their advocacy strategies to the laws and regulations that most constrict companies' ability to implement policies and practices that respect privacy and free expression rights. This three-pronged approach will result in national laws that are more respectful of rights—an end in and of itself—and that allow companies, in turn, to take concrete steps to improve their ranking.

Once individuals in a society benefit from increased enjoyment of privacy and free expression rights, they can continue to lobby companies and government authorities for improvements to laws, policies, and practices related to human rights more broadly, thus creating a virtuous circle whereby the exercise of human rights begets the enjoyment of yet more rights.
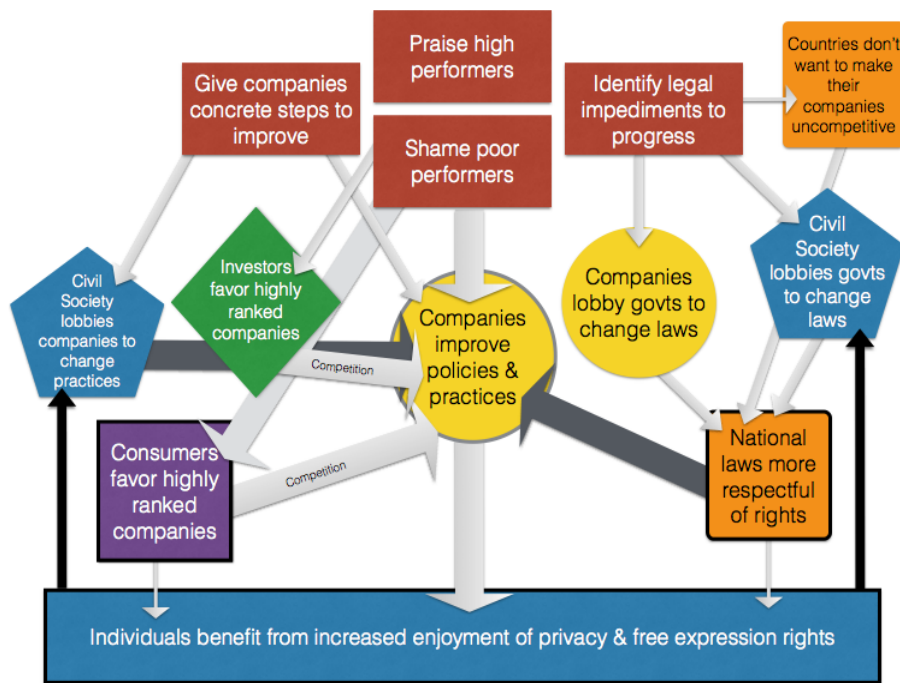


***Figure 1. Process map representing the Ranking Digital Rights theory of change.***
**Red: Ranking Digital Rights; Yellow: ICT companies; Green: investors;**
**Orange: governments; Purple: individuals; Blue: civil society.**

**Business and Human Rights:**
**The Guiding Principles and Corporate Social Responsibility**

Since the 2001 publication of Maria Green's article, human rights law has been increasingly applied to actors other than nation-states. Notably, the 2011 Guiding Principles on Business and Human Rights (hereafter "the Guiding Principles") extend the responsibility for respecting human rights to private sector companies. The concept of corporate social responsibility predates the Guiding Principles, but was poorly defined and haphazardly applied on a purely voluntary basis. After the UN Human Rights Commission (which later became the Human Rights Council) failed to negotiate a legally binding international treaty to compel the private sector to respect human rights, then-Secretary General Kofi Annan appointed Harvard professor John Ruggie to negotiate a mechanism that would be sufficiently acceptable to the business community to be effective in the short term. Despite initial opposition from human rights organizations, which favored a legally binding treaty, the resulting Guiding Principles were unanimously approved by the Human Rights Council in 2011 (Ruggie, 2013).

The Guiding Principles represent a significant departure from the prevailing paradigm that held countries solely responsible for regulating the private sector and preventing it from carrying out human rights abuses. This gave the private sector cover for all manners of abuses, which it could then blame on (often, but not always) developing countries with (often, but not always) struggling governance structures. The Guiding Principles' "protect, respect, and remedy" framework rests on three pillars: 1) the state duty to protect against human rights abuses by third parties, including business; 2) the corporate responsibility to respect human rights; 3) greater access by victims to effective remedy, both judicial and nonjudicial. While reiterating that nation-states continue to hold the primary responsibility for human rights, the Guiding Principles emphasize the responsibility of the private sector (and transnational corporations in particular) to respect human rights, and further spell out the respective responsibilities of states and corporations, as well as specific mechanisms for fulfilling these responsibilities (Ruggie, 2013).

Shortly after the United Nations High Commission on Human Rights (UNHCHR) released its monograph, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," the European Commission appointed a group of experts to develop the "ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights." The 94-page document operationalizes the UN Guiding Principles into the specific business context of the ICT sector. The Guiding Principles' expectations include:

- Determining specifically how a company's products, services, or business processes affect human rights both positively and negatively (in other words, to conduct a "human rights impact assessment").
- Developing and implementing policies and practices designed to mitigate human rights risks and avoid complicity in human rights abuses to the fullest extent possible.
- Engaging with organizations and individuals whose human rights are at greatest risk of violation in relation to the company's product or service. Addressing their concerns,

understanding the risks they face, and constructing the best possible policies and practices for respecting their rights.

- Providing remedy to aggrieved parties by ensuring the availability of effective grievance mechanisms.

The Ranking Digital Rights Project takes this guidance to a new level of granularity, operationalizing it into a set of specific criteria to which all ICT companies can be expected to adhere, regardless of legal or socioeconomic context.

## Conclusion

In this commentary, I have presented the Ranking Digital Rights project as an exemplar of the new Fifth Estate, one nimble node in a growing network that is as decentralized as the Internet itself. It stands in stark contrast to the pre-Internet watchdog and advocacy model: large-scale, centrally coordinated, global efforts with a mandate to change the world. Before near-ubiquitous Internet and e-mail enabled collaboration across disparate groups, this probably was the best structure available (Metzl, 1996). Thanks in no small part to ICTs, the future belongs to smaller efforts to tackle one discrete issue at a time. This Fifth Estate will continue to include NGOs, academics, bloggers, and other types of actors, including many that we haven't imagined yet. But this is only possible if the Internet freedom agenda succeeds. I've alluded to the very real threats from governments and other actors that have been described by Ronald Deibert, Rebecca MacKinnon, Evgeny Morozov, and others. More research on these evolving threats, and civil society responses to them, is needed from the activist community, from academics, and from journalists, who each bring different paradigms and skill sets to the table.

We desperately need a network ecology of actors fighting for the Internet freedom agenda worldwide, and we also need to better understand the field and identify knowledge gaps. Other topics for future research include the effectiveness of specific rankings and scorecards (challenges: hard to quantify, hard to establish causality, and some positive activities could be jeopardized by being made public), as well as the efficacy of socially responsible investors in getting companies to implement rights-respecting policies and practices. (Here again, data collection will require overcoming reticence from the business community.) Finally, more research is also needed to illuminate the dichotomy between the U.S. national security apparatus agenda and the Internet freedom agenda that was announced with such fanfare by then-Secretary of State Hillary Clinton in 2010 (Shirky, 2011).

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