

# Doing Internet Governance: Constructing Normative Structures inside and outside of Intermediary Organisations

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## 0. Abstract

Concepts of internet governance have been applied primarily to institutional structures, normative factors like law, technology and social norms and to their materialisations in written laws, contracts or code. However, if we not only see them as given artifacts, but also as (common) constructions of social reality, we can also shed light on uses and practices from a governance perspective. That's the "Doing Governance" approach. Unfortunately, theoretical concepts and methods needed for comprehensive analyses covering structures and processes are still missing. We propose to connect these by understanding governance as an achievement of figurations in line with Norbert Elias. We can attribute distinct features to particular figurations: individual and collective actors form specific constellations. The power, privileges and responsibilities of the actors are corresponding with these. Furthermore, they realise specific communicative practices in determinable frames of relevance. Looking at governance on the basis of this framework opens the methodological access twofold: first, we can conduct hermeneutic content analyses of the materialisations and thereby approach the normative structures; second, we can observe the figurations and analyse their features and communicative practices. We illustrate that this framework is useful on the basis of the case of governance of conflicts on search engine entries after the ECJ's ruling in the so called Google Spain case. This forces companies such as Google to set up their own procedures, rules and departments to handle deletion requests by users. We examine this change in the governance of search engine use and show at the same time how helpful the proposed framework is for understanding such transformations.<sup>1</sup>

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<sup>1</sup> In this paper we present the design and the theoretical and methodological foundations of the research project "Internet Governance: Constructing Normative Structures inside and outside of Intermediary Organisations", which is part an application for a DFG Collaborative Research Center called "Transforming Communications", proposed by the Universities of Hamburg and Bremen in 2016.

# 1. Phenomena of deep changes in the governance of intermediary internet services as subjects of internet governance research

As intermediary internet services like search engines, rating or video platforms have gained more and more importance for the flows of information in times of deep mediatisation in modern societies (cf. Esser/Strömbäck 2014; Hjarvard 2013; Lundby 2014; Meyen 2009; Thompson 1995), questions regarding the governance of and by these services become more important, too. Three examples may illustrate that we have not only seen deep changes in media environments and user behaviour, but also in governance regarding such services in the past years:

After the ECJ's "Right to be forgotten" ruling (ECJ 05-13-2014, C-131/12 – Google Spain) in a legal dispute between Google Inc. and a person requesting deletion of search entries that referenced him, Google Inc. was forced to establish procedures, rules and a department for further deletion requests to ensure compliance to European data protection laws. To put the judgement into practice, Google Inc. initiated an internal restructuring that involved setting up an appropriate department and process guidelines for checking deletion requests. Furthermore, an advisory panel staffed with external European experts ("Löschungsbeirat") was instituted by Google (cf. Google Inc. 2015). This amounts at least to a partially external restructuring. Furthermore, Google's task with regard to processes was and still is to evolve decision criteria and a decision-making procedure for assessment of the deletion requests - ca. 470.000 were filed from May 2014 to July 2016 (cf. <https://www.google.com/transparencyreport/removals/europeprivacy/?hl=de>) - as well as technical mechanisms for implementation.

Since recent leading cases, rating platforms and other forum providers have had to provide procedures for anybody who claims to have had his or her rights infringed upon by user posts on these fora to avoid civil liability in Germany. The considerable potential for conflict between users and providers of rating platforms is obvious, as legal disputes in civil courts and leading decisions by the German Federal Supreme Court ("Bundesgerichtshof", BGH) in this area show (cf. BGH, 23.09.2014, VI ZR 358/13 – Jameda and BGH, 19.03.2015, I ZR 94/13 Holiday Check and recently BGH, 01.03.2016, VI ZR 34/15 – Jameda II: all on the liability of rating platform service providers for infringements with regard to posts). There is also a preliminary decision on an entry which an algorithm of the rating platform Yelp classified as untrustworthy but the user claimed to be authentic (LG Berlin, 27.03.2014 – 27 O 748/13 – Yelp).

And lately, major internet companies like Facebook, Google and Microsoft proposed plans to strengthen their efforts against hate speech in coordination with the European Commission (European Commission 2016a), while, in the same week, the European Commission published a proposal for a revision of the Audiovisual Media Service directive (European Commission 2016b) that earmarks an obligation to establish "notice and action" procedures

for video platforms in the form of regulated self-regulation (Art. 28a 2.b AVMS Refit Proposal).

These phenomena point to the very relevant but still open research question of how normative structures are established; in other words, how the rules for information flows on intermediaries evolve, especially in such situations of “private ordering“, “transfer of law enforcement“ or “regulated self-regulation” to the organisations of intermediary service providers (cf. DeNardis 2014: 153-172).

With this paper, we propose a suitable analytical framework and empirical toolkit to answer this question by bringing governance theory, figurations-based sociology and STS methods together. To do so, we first point out some shortcomings of (internet) governance theory with regard to intermediaries (2.). In a second step, we will lay down how a figurative take on the rising “Doing” approach in governance research could overcome those gaps and the benefits that this provides (3.). Based on that, we will apply our framework to the Google Spain case and highlight aspects which demand further empirical research (4.).

## **2. Some shortcomings of (internet) governance theory - not only with regard to intermediaries**

Especially when it comes to the development and application of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the internet, “internet governance” seems to be a suitable cipher to describe the open processes of norm-making and the normative structures evolving in this domain that bring together multiple types of actors. This cipher is used to describe structures and processes on different levels of internet-based communication that can be distinguished analytically: at the level of informational contents and services, which the users at the ends of the cross-linked networks of the internet implement among themselves; at the level of protocols and other logical requirements, enabling the services and applications on content level; and at the level of the physical infrastructure, the cables and frequencies via which the necessary data transfers (Benkler 2000; Yee 2014; Puppis 2010: 259-266 with further references; cf. also Werbach 2002).

The discussion on internet governance in general and the factors to look at on the level of content and end-user services are disperse and have not yet come to a shared understanding (Katzenbach 2013; Katzenbach 2012; Ziewitz/Pentzold 2014). Traditionally, governance has been understood in organisation and regulation research to be a counter concept to simple hierarchical control by powerful actors, such as states or companies, taking all regulating subjects into account. Afterwards, the focus in governance research widened to the objects (the actors being regulated) as well as the instruments and structures of regulation themselves. That twist soon proved to be very fruitful, especially concerning the disperse contexts of internet governance, because it allows for the integration of more phenomena into a broader picture. And recently, efforts have been made to further distinguish governance as a label for all processes of “coordinating coordination” from regulation as intentional steering interventions (Hofmann et al. 2016). Looking at this ongoing conceptual development and these differentiations leads to the assumption that it is still an open task to generate a suitable

theoretical toolkit for governance research in order to arrive at finer granulated insights on certain processes of (reflexive) coordination serving the prevention or resolution of social conflicts.

So, the full potential of the governance approach has yet to be raised, especially when it comes to internet related questions. Today, concepts of internet governance are still applied primarily to structures formed by more or less institutionalised normative factors such as social norms, law and technology and to their materialisations in written laws, contracts or code.

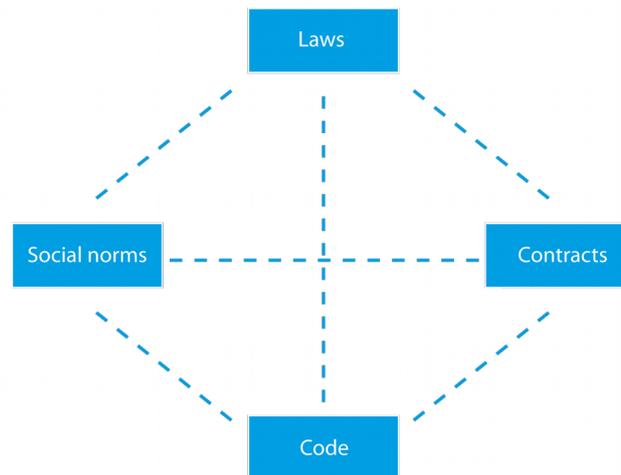


Fig. 1: Normative structures

We can already rely on some stabilised knowledge concerning these factors: all of them share the quality of being normative with regard to the behaviour of actors using internet services such as social media and other kinds of media that could count as manifestations of deep mediatisation. Some of the “norms” or aspects of these factors that we can differentiate are constitutive with regard to behavior as they generate possibilities to do something. That is obvious for code elements that together form the basic structures of internet platforms, but such norms are also common in law (cf. Hildebrand 2008). Some of them are regulative as they address behavior in more than a single situation and we can decide to deviate. Moreover, we were able to distinguish specific transmitter mechanisms for all four factors through which their normativity is exerted: legal sanctions, contractual liability, technological affordances and constraints, and social sanctions. But despite these structural commonalities, the differences should not be concealed; prima facie there are different organisations exerting impact on the evolution of the normative content of factors such as the state with regard to laws or the provider regarding code as the most relevant actor (Oermann et al. 2014). But we do not have a deeper understanding of these collective actors, their interrelation, the interdependencies of the factors, and the process of emergence of normative structures as such in internet governance thus far (Flyverbom 2016). Hence, how precisely structural adaptation to irritations producing pressure for the adjustment of normative structures is performed, is still an open question.

This stands in line with present shortcomings in governance research in general. First, it can be said that the focus is currently still too biased towards understanding structures without sufficiently taking the process perspective into account by looking also at the development and change of these structures (Quack 2005). Second, research on organisational governance is often focused on structural changes and their management within (business) organisations

(Badewi 2015), which is why these studies ignore, for the most part, the environment of the respective business organisations. Third, and in contrast to the foregoing, research on *internet* governance is focused mostly on “multi-stakeholder” governance structures (Malcom 2008) and treats organisations as monolithic, closed entities from an outside perspective without taking intra-organisational structures and processes into account.

A recent trend in governance research is promising to overcome all these restrictions. There are several authors who are using insights from the philosophy of knowledge and STS on the constructiveness of social reality, domains and entities, as well as on the performativity of action in general and specially communication to develop a particular perspective also on normativity and governance, especially on internet governance (cf. Musiani 2015). These authors do not just take materialisations of normative factors such as law and technology as given, stable artifacts, but also the normative factors as such as (common) constructions of social entities and reality by different kinds of social actors (as such constructions themselves) – they take them initially and at the end as constructions by the individual subject. By doing so, they are able to shed light on the uses and practices of these actors from a governance perspective. The works of Woolgar, Neyland, and Ziewitz are paradigmatic for this development (Woolgar/Neyland 2013, Ziewitz 2013). And also single works covering especially one of the normative factors are already using a comparable perspective as do Latour and Müller-Mall for law (Latour 2010, Müller-Mall 2012).

This STS informed take on governance, especially of and by technology, makes it possible to understand transformations in social reality in general, certain social domains and single social entities. By focusing on the aspect of creation, it can be felicitously named a “co-evolutionary” perspective (Just/Latzer 2016), without making a claim about the characteristics of the transformation processes as being, for example, linear, undulate, recursive or circular though. But furthermore, it also enables us to explain how normative structures mould the behaviour of actors while being constituted through the communicative practices of these actors at the same time. With reference to this, it can be called a “Doing Governance” approach (Epstein/Katzenbach/Musiani 2016).

### **3. How to overcome the shortcomings by a figurative take on “Doing Governance”**

Unfortunately, theoretical concepts, models and methods needed for comprehensive analyses covering structures and processes based on the “Doing Governance” approach are still missing. There is no comprehensive analytical and methodological framework to empirically investigate, analyse and explain the realisation of governance in this sense. We propose such a framework by understanding governance as an achievement of figurations in line with Norbert Elias.

#### **3.1 Realisation of governance as communicative processes in *figurations***

Looking at society from an actor-theoretical perspective justifies the statement that each social domain is linked to a typical “constellation of actors” (Schimank 2010: 202-206) interacting with each other. Such interrelations “in action” can be analysed in a proper way with the

process-sociological approach of Norbert Elias, prepared in his book “What is sociology?” (1978).

He knew the difficulty of social analysis and argued that “the social” and its structural transformation could be explained best in terms that grab the shifting relations between individuals and society through space/time, traversing the micro, meso and macro level which are often treated as static and separated in sociological thinking (Hepp/Hasebrink 2013: 10-12; 2014b: 353-354). To do so, he approached these dynamics by taking networks of actors, including individuals, collectivities and organisations as figurations of interdependent people (in plural) which he saw as always in flux. On that account, figuration is a simple conceptual tool to understand socio-cultural phenomena in terms of processes of interweaving (Elias 1978: 130). Elias emphasized, that sociological thinking should always try to avoid to reduce these processes by using often taken for granted concepts referring to states or isolated objects like actor, individual or society without taking into account, that “the social” always refers to processes between interdependent human beings forming constantly changing figurations. That is why Elias approach has been qualified as orientated towards the primacy of process of change (cf. Goudsblom 1977: 6, 105).

When we bring this processual perspective on socio-cultural phenomena and sociological thinking together with the epistemo-/ontological position of a constructivist “Doing” approach on society and social order, it draws our attention to *communication*. Speaking about society as (social) constructivist, the central mode of “doing” it can be denoted as *communication*. Starting with us as human beings, it is viable to say that everyone of us is (re-)constructing ourselves as “individual” with a certain “identity”, as “actors”, our “reality” and managing life and day to day challenges therein by using knowledge about “the world”, “how things are”, and “how I should behave”. We acquire this knowledge in circular processes that can be flagged as an interrelated externalisation/internalisation of meaning by *communication* through which objectivations of ontologies, ethics, logics and so on are established (cf. Berger/Luckmann 1967). From this viewpoint “the process formation of knowledge is itself a [communicative] social process the results of which are necessarily relative” (Goudsblom 1977: 105). Based on the axiom of the constructiveness of social reality, each social figuration of human beings can therefore be understood as a communicative one – above all, under the nowadays conditions of (deep) mediatisation (cf. Hepp/Hasebrink 2013: 10-12).

Particular communicative figurations can be link to distinguishable features then: Beginning with Elias, communicative figurations can be defined as – typically cross-media – patterns of interweaving people through *practices of communication*. To make *figuration* even more usefull as a conceptual tool for further sociological analysis of this processes, it can be said – while constantly reflecting the constructiveness and processual shortcomings of these concepts and logics – that a certain communicative figuration is characterised by a particular intertwined group of actors, irrespective of if they are individual or collective (Hepp/Hasebrink 2013: 14; Schimank 2010: 211-213). The actors involved build up a “unity of meaning”. This unity orientates both the ongoing procedure of producing, as well as the perception of this communicative figuration (Hepp/Hasebrink 2013: 14). Thus, each communicative figuration is further characterised by an action-guiding and orienting topic forming a *frame of relevance* that makes this detectable as a sensuous “whole” (Hepp/Hasebrink 2014b: 354).

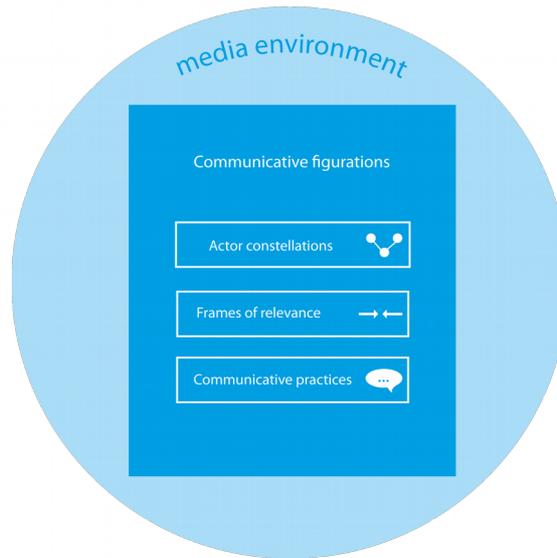


Fig. 2: Communicative figurations

Norbert Elias' approach of figurations originated in a time when digitalisation and deep mediatisation was not widespread. But at least when adapted to the new environment, the approach does not lose its functionality nowadays. Deep mediatisation makes new figurations possible through phenomena such as chats, apps, platforms or through different forms of intermediaries – these days, some figurations are entirely built up by media technologies (Hepp/Hasebrink 2013: 15). Today, we are confronted with various dynamically changing media-related figurations (cf. Morley 2007; Meyrowitz 2009). Individuals are involved in such figurations by means of the role and position they have in the respective actor constellations (cf. Elias 1978: 15).

On this basis, it is obvious that communicative figurations could hardly be seen as harmonious (Hepp/Hasebrink 2014a: 262). In contrast, we have to be aware of the fact that certain asymmetrical power relations, inequalities and conflicts characterise many figurations and the way privileges are allocated and responsibilities are divided between the actors – apparent not least in normative structures, “realised” in and by their *communicative practices*.

Furthermore, we must pay attention to the importance of *knowledge* as a resource for decisions and action not just on the individual, but also on the collective level. Without *knowledge* about the environment and its qualities, about the shared objectivations (“truths” so to say), no decisions can be made, no deliberated action be processed and no rules and normative structures can be established or transformed – the latter by the communication through which they are constituted as social entities. That seems to be a viable assumption for the individual subject, as well as for collective actors such as organisational-constituted companies, NGOs, authorities, courts, states and so on. So when we approach governance from a “Doing” perspective, we also have to keep an eye on the processes of the construction of knowledge – processes that we assume to occur above all in and by *communicative practices*, which allow us to ask questions regarding power, as well as regarding knowledge (cf. Goudsblom 1977: 6).

To sum it all up, we understand normative factors such as law, technology and social norms to be social entities that are constituted in and by the (communicative) practices in figurations. The normative structures formed by them mould the practices of the figurations and, thus, the “doing” of society from the construction processes on the individual to the constitutional

processes on the collective level and in between. In this respect, there is a reciprocal relationship of interdependence between structures and practices. Referencing Anthony Giddens, we could also call this reciprocal relationship the “duality of structure” (cf. Giddens 1984: 24-28). A figuration theory “infused by (social) constructivism” is therefore suitable to combine structural and process perspectives on governance.

### 3.2 Benefits of a figurative take on (internet) governance

Approaching (internet) governance on the basis of this analytical framework thus provides certain benefits. The concept of figuration is scalable on the micro, meso and macro levels and can be applied also transversely to these analytical levels so that the *organisations* of intermediary providers could be taken into account as figurations themselves, situated in the meta figuration of governance of intermediaries and so on. This understanding of internet governance as a “figuration of figurations” will enable us to explore “internal” and “external” constructions inside and outside of the intermediary organisation at the same time. In addition, the framework's generality allows us to analyse and explain the development of different normative entities such as law, technology and various other social norms and to link micro and macro levels also within this dimension.

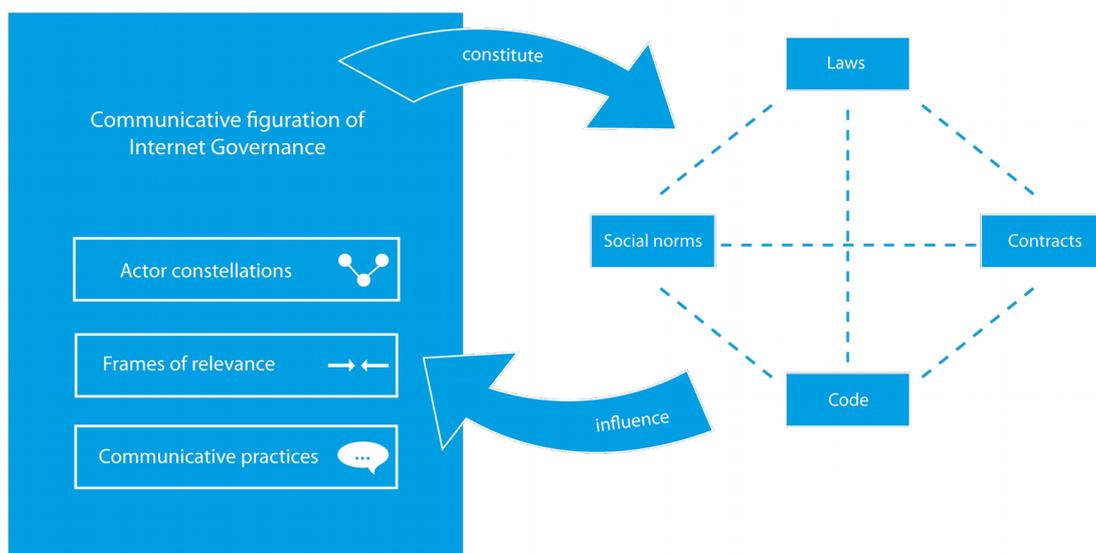


Fig. 3: Governance as communicative figuration

Furthermore, a figurative, performative take on (internet) governance opens the methodological access twofold: first, we can conduct hermeneutic content analyses of the materialisations of normative factors such as contracts/TOS, laws or code, and thereby unveil the normative structures; second, we can observe the figurations and analyse their features and communicative practices, e.g. by interviewing involved actors, tracking and analysing mediated discourses or by actively observing the figuration by means of ethnographies.

By doing so, we are able to merge the structural and procedural, as well as the behavioural, actor-centric perspective to arrive at a comprehensive, yet fine-grained understanding of the governance realised through communicative constructions of normative structures. This will allow us to answer the following important questions: How are rules and normative structures established and how do processes in their transformation go off? On which norm-sets do

actors reference when they decide on new cases? What conditions must be met for deducing a rule from a decision in a single case?

Regarding the phenomena of “regulated self-regulation” or “private ordering” on intermediary internet services as mentioned above, this framework will allow us to use them as case studies. In order to do so, we will take the moments of irritation of established normative structures (like the ECJ ruling against Google Spain, which is producing pressure for the behaviour adjustment of the actors of the figuration of internet governance) as a starting point for investigations.

## 4. The figurative “Doing Governance” approach *in practice* - the Google Spain case

Google Search, the search engine service provided by Google Inc. with a market share of 94.1% in Germany and 92.8% in Europe (Maier 2014; cf. Statcounter 2015), stands *pari passu* for search engines in general because these have to consider the same legal requirements and standards resulting from substantial overlaps in business model and method (use of web crawlers, presentation of search results etc.), although other service providers are not addressed directly by the ECJ’s ruling in May 2014 on the Google Spain case. So, the Google Spain case is an appropriate instance of the change of internet governance in respect to search engines as important content-related intermediary services in the course of a shock to one of the normative factors.

Starting our analysis of the case with an isolated look at these *normative factors*, some aspects of transformation are obvious: those mainly affected here by the changed interpretation of law – in concreto of the Directive 95/46/EC – by the ECJ are contract/ToS and code. Since the ruling, users of Google Search can fill out a request form provided by Google Inc. concerning the deletion of search results showing URLs and information snippets including their personal data, which is checked and edited internally by Google Inc. (cf. [https://support.google.com/legal/contact/lr\\_eudpa?product=websearch](https://support.google.com/legal/contact/lr_eudpa?product=websearch)). The transformation of factor laws, therefore, also has an impact on the technological code and on the contractual provisions between Google Inc. and the users of Google Search. A specificity of the case is that the companies themselves are commissioned with the implementation of the requirements by creating their own decision-making procedures regarding delete requests by users. So, the ECJ’s ruling against Google Search represents a case of (decreed) “private ordering” (Kulk/Borgesius 2014: 394-395). Future in-depth analysis will have to show whether or not we can observe a transformation of social norms in these private ordering processes and if there are stresses or fractures in the *normative structures* when we bring together the different factors into the bigger picture. We see some indication for the latter as prominent single voices in legal and public discourse, such as the Wikipedia founder Jimmy Wales or the judge of the German Constitutional Court Johannes Masing, made the argument that the new legal position does not reflect enough the importance of information access and free speech (cf. Curtis/Philipson 2014, Masing 2014).

There are also users who still appeal to the state courts in addition to the deletion procedure provided by Google Inc. That’s why Google Inc. needs to coordinate their processes

accordingly with partially parallel proceedings. So the changing of internet governance through effects on factors as a reaction to the ECJ's judgement in this case cannot be considered a one-off completed process. Evidence for this is provided by recent initiatives of data protection authorities and a German regional court ruling trying to expand the ECJ's ruling on non-European domain names, or on entries of online archives and second-order media coverage of deletion processes (cf. Commission nationale de l'informatique et des libertés 2015; Provincial High Court Hamburg, 07-07-2015, 7 U 29/12; Information Commissioner's Office 2015). Moreover, it is already clear that there will be additional amendments or transformation impulses in factor law in the future when the European legal guidelines on privacy law are reset with the enactment of the General Data Protection Regulation in May 2018 (GDPR) (cf. Ehmann 2015; Veil 2015).

During the legislative process, there has been an intense discussion whether or not an explicit "right to be forgotten" should be stipulated in the General Data Protection Regulation (cf. Art. 17 GDPR). This catchphrase was first coined by Victor Mayer-Schönberger in 2009 and has since then become a common name of the topic in discourses on the legal position regarding the rights and claims of natural persons on the data which reference them that are processed by service providers. After the ECJ's ruling on Google Spain, it has also been widely applied in the discourse on the consequences of this ruling. It thus seems to work as a *frame of relevance* here when we take it in terms of *communicative figurations*.

A first glance at the *actor constellation* communicating in this frame of relevance shows us some actors whose participation in the figuration of internet governance in this case is obvious. This includes not only Google Inc., especially its deletion request department and the individual users, but also actors such as the external advisory panel, the ECJ and the national courts, as well as data protection authorities, which are responsible for the enforcement of data protection law, and consumer protection associations. If other actors are to be taken into account as part of the figuration of internet governance in this case, it must be tested empirically.

By looking at the *communicative practices* of these actors, the interweaving of process and structure becomes manifest. During the legal proceedings and Google Inc.'s deletion procedures, normative structures and their transformation are realised as the communicative practices are taking place. Normative structures which are constituted influence the practices recursively. By doing so, governance is made – the actors of the figuration are *doing* it.

Furthermore, we see phenomena of deep mediatisation in non-public communication when it comes to the deletion procedures and the communication between Google Inc. and individual users of Google Search – while the ECJ, national courts, authorities and the parties to official proceedings still communicate as far as we know mostly via offline media like post and fax. All the collective and organisational actors also address communication to the public: Google Inc. with its transparency report, FAQs and policy outlines and notes in the search results overview pointing to the possibility that some results could be missing because of the European legal position (cf. <https://www.google.de/policies/faq/>); courts, authorities and consumer protection associations by means of public websites, press releases and so on. But we have almost no insights regarding the dark fields of informal, non-public communication between the collective actors and especially regarding the intra-organisational practices of the intermediary service providers – fields of relevance, having in mind that by the means of private ordering processes of public interest and respective decisions, powers are delegated to these providers.

To close the aforementioned gaps in empirical research, we will use a mix of qualitative methods to ensure the widest possible collection of data both with regard to the normative structures and with regard to the communicative figurations and the communicative practices in particular. By doing so, we ensure an appropriately profound analysis. The investigation of the normative structures will be based on the qualitative data analyses (Maxwell/Chmiel 2014) of the relevant material such as laws and leading judicial rulings, contracts or Terms of Services, and the code material of the intermediary service which is under investigation (Oermann/Ziebarth 2015).

The collection of data for the actual communicative figurations occurs in a phased, methodically triangulated procedure. First, we will identify those collective and individual actors of the figuration of internet governance in an analysis of the media coverage of the actual changing impulses that are designated as relevant in view of the expected structural changes or mutually designate themselves as relevant. Based on this, we will carry out guided interviews with these actors or with the representatives of these actors concerning their communicative practices (Roulston 2014). Here, a split into two waves of interviews will allow us to include players in the second wave whose relevance only becomes apparent in the evaluation of the results of the first wave. In addition to this, we also want to apply ethnographic methods (participating observer) to detect and to analyse the practices taking place within the central, strictly closed organisation of Google Inc. (cf. Marvasti 2014), which we see as a figuration in its own right. Results of the analysis of data from this experience-based view on Internet governance from an intra-organisational perspective will then be contrasted and set in context with results of the analysis of the meta-figuration of Internet governance.

As a result, the analysis of the Google Spain case will provide us answers to many of the general questions that we have raised thus far. We will be able to understand transformations in social reality, certain social domains and social entities, as well as how internet governance regarding intermediaries is achieved. Furthermore, we will be able to more sufficiently explain how normative structures mould the behaviour of actors while at the same time being constituted through the communicative practices of these actors.

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