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Structural Power as a Critical Element of Social Media Platforms' Private Sovereignty

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I. Introduction

This chapter discusses how large social media platforms are acquiring a form of private sovereignty, exercising a form of “structural power”¹ as they define and implement their private ordering systems². The goal of this work is to stress the existence of a new conception of “sovereignty”³ that is intrinsically associated with the definition of the contractual regulations, technical architectures, and adjudication capabilities of digital platforms. The article will use the concept of “structural power” elaborated by Susan Strange in her 1988 book on “States and Markets” to illustrate how platform create private ordering systems. Ultimately, it will argue that such systems allow platforms to elude oversight from national governments, de facto giving rise to private type of sovereignty.

These considerations seem particularly relevant in the context of the current raise of “digital sovereignty” narratives at the state level.⁴ Indeed, this chapter invites the reader to consider

*This author would like to acknowledge Dr Monica Horten, for the useful conversations on how the “structural power” concept can be used to understand the dynamics of Internet intermediaries. A compelling work in this sense is: M. Horten, *Closing of the Net* (Polity Press 2016)

¹ The concept of “structural power” was first elaborated by Political Scientist Susan Strange in her 1988 book “States and Markets.” Strange’s conceptualisation of structure can be seen a labyrinth shaped by the actor holding structural power. Such metaphor is useful to understand the structural power as the power of those who are able to define where walls are in the labyrinth or when doors can be open or closed, thus ultimately controlling how and mice that are inside can move. See Susan Strange, *States and markets* (1st edn, Continuum 1988).

² For a digression on private ordering, see Galf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code. A Theory of Transnational Private Law* (Oxford/ Portland: Hart 2012); Luca Belli and Jamila Venturini ‘Private ordering and the rise of terms of service as cyber-regulation’ (2016) 5 *Internet Policy Review* <<https://doi.org/10.14763/2016.4.441>> accessed 23 July 2021.

³ Sovereignty is a complex concept which arose as an attempt to frame the internal structure of a state. Peter Malanczuk provides a useful discussion of sovereignty and its evolution arguing that the sovereign enjoys the “supreme power” to decide who is “bound by the laws which he made”. See P. Malanczuk Akehurst, *Modern Introduction to International Law* (7th edn, Routledge 1997).

⁴ For an analysis of the concept of Digital Sovereignty see J. Pohle and T. Thiel ‘Digital sovereignty’ (2020) 9(4). *Internet Policy Review* <<https://doi.org/10.14763/2020.4.1532>> accessed 23 July 2021. For a succinct reconstruction, also with reference to the digital context, see Edoardo Celeste, ‘Digital Sovereignty in the EU:

NON-FINAL DRAFT. Please quote as *Luca Belli. Structural Power as a Critical Element of Digital Platforms' Private Sovereignty. In Edoardo Celeste, Amélie Heldt and Clara Iglesias Keller (Eds). Constitutionalising Social Media. (Hart 2022).*

with a different perspective the concept of (digital) sovereignty paying closer attention to the role that non-state actors play by designing and implementing private structures that construct sovereignty.

The first section of this chapter will provide some preliminary considerations on the regulatory role of technology and the strategic function of private orderings established by major corporations. This section will highlight in particular how these features are well known by governments of countries leading the development of digital technology since several decades. The section will stress that recent history allows us to understand that the regulatory potential of technology was realised many decades ago but not fully understood by all policymakers. Furthermore, the possibility that technological behemoths – notably, social media platforms – evolve into entities able to structure and exercise their own sovereignty and elude nation-state power has started to be appreciated only recently.

The second section will build upon previous works on platform regulations, where the conceptualisation of platforms as “quasi sovereigns” was first pondered by this author together with several co-authors.⁵ Based on these conceptualisations, this section will contend that social media platforms behave as private cyber-sovereigns, enjoying quasi-normative power, quasi-executive power, and quasi-judicial power. The quasi-normative power is exercised through the unilateral definition of terms and service – or “law of the platform”⁶ – and the technical interfaces utilised to present them, sometimes in remarkably biased fashion,⁷ as well

Challenges and Future Perspectives’ in Federico Fabbrini, Edoardo Celeste and John Quinn (eds), *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart 2021). For a digression on why emerging economies might be keen on building digital sovereignty narratives, see L. Belli ‘BRICS Countries to Build Digital Sovereignty’ in L. Belli (Ed) *CyberBRICS: Cybersecurity Regulations in the BRICS Countries*. (1st edn, Springer 2021). <https://link.springer.com/chapter/10.1007/978-3-030-56405-6_7> accessed 23 July 2021.

⁵ This section will be largely based on the considerations first put forward in: L. Belli and P. De Filippi ‘Law of the Cloud v Law of the Land: Challenges and Opportunities for Innovation’ (2012) 3 *European Journal of Law and Technology* <<https://ssrn.com/abstract=2167382>> accessed 23 July 2021; L. Belli and J. Venturini (n 2); L. Belli, P.A. Francisco and N. Zingales (2017) ‘Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police’ in L. Belli and N. Zingales (eds), *Platform Regulations How Platforms are Regulated and How They Regulate Us* (FGV Direito Rio 2017); L. Belli and C. Sappa ‘The Intermediary Conundrum: Cyber-regulators, Cyber-police or both?’ (2017) 8 *JIPITEC* 183.

⁶ L. Belli, P.A. Francisco, N. Zingales (2017) ‘Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police’ in L. Belli and N. Zingales (eds), *Platform Regulations How Platforms are Regulated and How They Regulate Us* (FGV Direito Rio 2017).

⁷ This is the case of the so-called “dark patterns”, a concept first introduced by Harry Brignull, ‘What are Dark Patterns?’ (2018) <<https://darkpatterns.org/>> accessed 20 July 2021. The author defined these misleading user interface designs as “tricks used in websites and apps that make you do things that you didn’t mean to, like buying or signing up for something”. An excellent overview of what are dark patterns is provided in: A. Mathur, J. Mayer and M. Kshirsagar, ‘What Makes a Dark Pattern... Dark?: Design Attributes, Normative Considerations, and

as by defining what personal data will be collected about users. This latter element might be compared to the power of legislative assemblies to lay and collect taxes: in the platform environment, however, such taxes are imposed on platform users, rather than citizens and paid with data, rather than money. The quasi-executive power can be identified in the unilateral implementation of the platforms' terms and conditions, decisions, and business practices via the platform technical architecture. Lastly, the quasi-judicial power is exercised by establishing the alternative dispute resolution mechanisms that solve controversies based on the platforms' unilaterally defined contractual conditions.

This section will draw upon Susan Strange's work on "States and Markets"⁸. The British political scientist convincingly argued that sovereign entities exercise power not only through the ability to compel someone to do something and through "classic" manifestations of power – i.e. through the creation of regimes that regulate societies – but also through the power to shape the structures defining how everything shall be done – i.e. defining the frameworks within which people, corporations, and even states relate to each other. Importantly, this chapter contends that Susan Strange's considerations do not apply to states and markets alone but, also, to technology. By shaping how people or corporations can interact amongst themselves, how they can do business or communicate, technology in general and social media platforms, in particular, can deploy an enormous structural power that regulates effectively how the societies where such technology is utilised will function.

While not well-known in legal circles, Susan Strange's work is particularly relevant, as it offers an illuminating reading of how power can be exercised by public powerful actors (sovereign states) but also by private constructions (markets). At the same time, the concept of structural power is particularly useful to apprehend how technological structures - or "architectures"⁹ to use a term dear to Lawrence Lessig - can shape the relationship between technology users, be them physical or juridical persons, thus providing a telling illustration of the regulatory capabilities of the "structural power".

Measurement Methods' [2021] Proceedings of the 2021 Conference on Human Factors in Computing Systems <<https://dl.acm.org/doi/10.1145/3411764.3445610>> accessed 20 July 2021.

⁸ Susan Strange (n 1).

⁹ The term is utilised in the conception proposed by Lawrence Lessig. See Lawrence Lessig "The Law of the Horse: What Cyberlaw Might Teach" [1999] Harvard Law Review 501; L. Lessig, *Code: And Other Laws of Cyberspace Version 2.0*, (Basic Books 2006).

In this sense, Strange's concept of structural power comes useful to provide an additional perspective from which we can see the concept of architecture as envisaged by Lessig. The latter argues that architectures are constraints that both in the physical¹⁰ and digital realm structure (cyber)spaces, determining whether specific behaviours are allowed by design, and thus playing a regulatory function. The conceptualization formulated by the former allow us to consider the capacity to regulate by architecture as a real form of power through which, I will argue, sovereignty can be exercised.

Regulation by architecture is possible in the physical world but the level and scale of control achieved by the digital architectures of online platforms is impossible to achieve in the offline world, even with the most sophisticated design choices. Moreover, the algorithms that enable platforms' functionalities – for instance, establishing the order according to which information will be displayed on the platform's timeline – do not need implementation, as they are “self-executing norms”¹¹ that can be constantly updated to fit new needs and purposes defined unilaterally by the designer. This context will be used to illustrate how platforms concentrate quasi- normative, executive and judicial power, which are instrumental to underpin their private sovereignty.

The final section will argue that the tendency towards the establishment of complex private orderings, giving rise to the platforms' private sovereignty, may be the expression of a convenient compromise between platforms, eager to keep on self-regulating and escape public oversight, and governments, eager to avoid responsibility to regulate. The latest evolution towards such private sovereignty is epitomised by the recently established private supreme court by Facebook, the “Oversight Board”¹², which may be seen as a clear attempt to construct new institutions, providing a façade of accountability, and sopping and distracting stakeholders, while de facto corroborating platforms' private sovereignty, evading public scrutiny and, ultimately, benefitting shareholders.

¹⁰ An example offered by Lessig is the architecture of the city of Paris, which was reorganised with large avenues by Baron Haussmann to prevent rebellious people from taking control of the city centre, as previously happened during the third French revolution of 1848. See L. Lessig, *Code: And Other Laws of Cyberspace Version 2.0*, cit..

¹¹ L. Belli *De la Gouvernance à la régulation de l'Internet* (Berger-Levrault 2016) 140-144.

¹²Oversight Board, ‘Ensuring respect for free expression, through independent judgment’ <<https://www.oversightboard.com/>> accessed 20 July 2021

II. The regulatory function of technology: unequally appreciated by different actors

To understand how social media platforms are shaping their structural power and how this can be seen as a new form of private sovereignty, it is essential to first acknowledge the regulatory function of technology. On the one hand, technology always embeds the values of its creators and, therefore, can be a powerful vector to project such values even beyond the national borders of its country of origin. On the other hand, technology can be repurposed and utilised for applications that may considerably differ from the original objectives of its creators. Hence, exactly as other tools enabling regulation, technology can promote or restrict specific behaviours, but, as it is not set in stone, it can also be updated, consequently modifying the type of behaviours that it fosters or hinders.

While this reasoning applies to any technology, digital technology maximises these features as it is much more scalable and easily updatable than any other technology. A single new technology can be adopted in few years by millions – or even billions – of individuals and businesses and its software structure can be relatively easily updated – if compared with other technologies. These features make it particularly relevant to carefully ponder how digital technology affects the ways in which individuals' and businesses' juridical sphere is shaped by such technologies. Indeed, rarely the impact of technology is neutral.

A. Some lessons from (Internet) history

The history of how Internet technology evolved is a telling example. The research community that conceived the Internet envisaged it as a technology enabling decentralised networking, thus increasing resilience in communications, while removing points of control.¹³ However, the evolution witnessed over the past decade proves that, even if openness and decentralisation were the initial objectives, points of control have quickly emerged.¹⁴ The current concentration and platformisation of the digital environment provide telling examples not only of the

¹³ For a historical account of the first phases of the Internet technical and normative evolution, see L. Belli (n 11) 133-190.

¹⁴ J. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press 2006). See also OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (OECD Publishing 2011) <<http://dx.doi.org/10.1787/9789264115644-en>> accessed 20 July 2021; N. Tusikov, *Chokepoints: Global Private Regulation on the Internet* (University of California Press 2016).

regulatory function of technology but also of how the application of a given technology may radically redefine the philosophy behind its initial conception.

Importantly, the potential of digital technologies to regulate and shape society – should they be massively adopted – as well as their extremely strategic value have been understood by some stakeholders many decades ago. Already in the late 1970s, Zbigniew Brzezinski, a high-ranked US official who acted as Security Advisor to US President Jimmy Carter, famously acknowledged the regulatory and control capabilities of digital technology and the power that would reside in the “elite” developing it.¹⁵ Conspicuously, the Security Advisor stressed

“the gradual appearance of a more controlled and directed society [...] dominated by an elite whose claim to political power would rest on allegedly superior scientific knowhow. Unhindered by the restraints of traditional liberal values, this elite would not hesitate to achieve its political ends by using the latest modern techniques for influencing public behavior and keeping society under close surveillance and control.”¹⁶

The fragment above delineates an early awareness of the instrumental role of technology to regulate as well as the strategic value of being the producer of the most advanced and utilised technologies. Importantly, such “structural power” of technology started to be explicitly acknowledged in a period of intense ideological clash, such as the Cold War. Those years witnessed the emergence of a clear understanding of technology’s potential to be utilised as a vector to spread and implement the values that are embedded in it. Already in the 1960s, some countries started devoting enormous public investments to fund technological research and development and, at the same time, many policymakers, academics, and business leaders started to realise the regulatory potential of technology. This potential could have directed – and still can be directed – towards fostering democratic values, unrestricted communications, and free flow of information, but could also at the same time increase surveillance and information gathering on a massive scale.

In light of the above considerations, it is not a coincidence that, in this period, the first data protection regulatory frameworks started to take shape, while also the first efforts to facilitate

¹⁵ Zbigniew Brzezinski, *Between Two Ages America's Role in the Technetronic Era* (The Viking Press 1970) 96.

¹⁶ *Ibid.*

transnational data flows. The fear of abusive use of technology, on the one hand, and the economic interests of the main technology producers, on the other hand, were the main drivers of such efforts.¹⁷

This double nature of digital technology – on the one hand, facilitating free communication, trade, and development, while, on the other hand, enabling surveillance, and control – seems to have been recognised by the most attentive stakeholders already in the late 1970s. Such recognition is epitomised by the parallel elaboration and subsequent adoption of the first two international documents prompting personal data regulation at international level. On the one hand, the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data,¹⁸ adopted in 1980 by the Organisation for Economic Co-operation and Development (OECD) aimed at regulating transnational flows of personal data, which were already seen as an essential strategical and economical asset by the most technologically advanced countries within the OECD.¹⁹ On the other hand, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data²⁰ (usually referred to as “Convention 108”) was elaborated in the same period and adopted in 1981, having in mind the need to “extend the safeguards for everyone’s rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing”.²¹

¹⁷ Article 1 of the 1978 French Data Protection Act encapsulates tellingly the fears and hopes that the rise of digital technology arose in society at the time: “*L’informatique doit être au service de chaque citoyen. Son développement doit s’opérer dans le cadre de la coopération internationale. Elle ne doit porter atteinte ni à l’identité humaine, ni aux droits de l’homme, ni à la vie privée, ni aux libertés individuelles ou publiques.*” See *loi n° 78-17* du 6 janvier 1978 relative à l’informatique, aux fichiers et aux libertés <<https://www.cnil.fr/fr/la-loi-informatique-et-libertes>> accessed 21 July 2021

¹⁸ Organisation for Economic Cooperation and Development, 'Guidelines On The Protection Of Privacy And Transborder Flows Of Personal Data' (1980) <<http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm>> accessed 21 July 2021

¹⁹ It is important to remind that the OECD was originally established in 1948 as the Organisation for European Economic Co-operation (OEEC), to help administer the US-sponsored European Recovery Program (better known as “Marshall Plan”). While it can be argued that the considerable US influence in the organisation did not fade away until the beginning of the XXI century, in 1961, the OEEC was reformed into the OECD, by the Convention on the Organisation for Economic Co-operation and Development and membership was extended to non-European states.

²⁰ Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981 ETS no 108 <<https://rm.coe.int/1680078b37>> accessed 23 July 2021. The Convention opened for signature in January 1981 and was the first legally binding international instrument in the data protection field. The updated version of the Convention 108 was adopted in 2018, becoming the “Convention 108+”, and is available at <<https://rm.coe.int/leaflet-data-protection-final-26-april-2019/1680943556>>

²¹ *Ibid*

The policymaking efforts mentioned above are particularly relevant in two different ways. First, they let us understand that the regulatory potential of technology is well known at least since the 1970s and the most advanced countries have tried to shape their policies, aware of how technology can regulate society, since at least forty years. Second, the early attempts to create a regulatory framework that can orientate the evolution of technology also proves the awareness that, paradoxically, the lack of public regulation and the encouragement of self-regulation is a clear regulatory choice.

Indeed, the absence of public regulation does not mean that society will not be regulated, but rather that the private entities will be delegated the task to regulate society through the self-regulatory tools (be them contractual or technology) they develop. Both documents acknowledged the potential impact of information technologies on individual rights and on businesses and strived to define frameworks to facilitate the transborder use of such technologies without undermining neither rights nor business opportunities.

B. Towards private structural power: a deliberate regulatory choice

Another page of Internet history is particularly helpful to illustrate how the regulatory potential of technology and the “structural power” exercised by private entities is not something unknown by policymakers – although it might have been ignored by some – and has underpinned very concrete national strategies.

When the Clinton administration established its Framework for Global Electronic Commerce, in 1997, the intention to delegate Internet regulation to contractually based self-regulatory regimes was clear and explicit. The Framework argued that “[t]he success of electronic commerce will require an effective partnership between the private and public sectors, with the private sector in the lead”.²² However, while understanding fully the “explosive growth” that private sector involvement had provided to digital technologies and the capacity of private intermediaries to define private regimes, the abovementioned document naively – or falsely naively – considered that “private fora” would have been an effective solution to “take the lead

²² B. Clinton and A. Gore, *A Framework for Global Electronic Commerce* (World Wide Web Consortium 1997) <<http://www.w3.org/TR/NOTE-framework-970706>> accessed 21 July 2021.

in areas requiring self-regulation such as privacy, content ratings, and consumer protection and in areas such as standards development, commercial code, and fostering interoperability".²³

The above illustrates that it is not absurd to posit that the capacity of Internet intermediaries in general, and social media platforms in particular, to structure the digital world via their technical architectures and contractual regimes formed a pillar of US economic, foreign, and regulatory policy, since the 1990s. The establishment of private ordering systems was indeed deemed as an effective way to regulate an environment where classic sovereignty was still struggling to be implemented. In this context, Susan Strange's concept of "structural power" becomes a useful ally to better understand these dynamics.

Over the past few decades, several US administrations effectively maintained a centralised power over core regulatory functions of strategic markets by fostering global private corporations that could cultivate "the perception of market-based private ordering"²⁴ while de facto act as proxies for the implementation of US-values and regulation on a global scale, with no need for direct US government intervention.²⁵ In this sense, a compelling case was already provided by Nico Krisch more than fifteen years ago, emphasising the role of private actors with global range – such as the "Big Three" credit rating agencies, S&P, Moody's and Fitch – as instances of the "privatization of international rule", globally disseminating U.S.-centric standards and practices.²⁶ Likewise Christopher M. Bruner offered an interesting analysis of how the US government has successfully "instrumentalized private actors" to regulate quintessentially global sectors through private ordering while being able "to obscure the government's own responsibility for adverse outcomes, shifting blame onto the private sector".²⁷

²³ *Ibid*, notably the section on "A Coordinated Strategy"; emphasis added.

²⁴C. M. Bruner, 'States, Markets, and Gatekeepers: Public- Private Regulatory Regimes in an Era of Economic Globalization' (2008) 30 *Michigan Journal of International Law* 125.

²⁵ A telling example in this sense is the parallel copyright regime developed by YouTube, which can be deemed as the most utilised content distribution platform. This example is particularly useful to illustrate the extraterritorial application of a national regulatory regime – in this case, US copyright legislation – de facto turning the platform into a private proxy for global application of national regulation. See L. Belli, P.A. Francisco and N. Zingales (n 5) 54-59.

²⁶Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *The European Journal of International Law* 369.

²⁷ In his paper Bruner discusses two useful examples: the regulation of national credit risk through the creation of private credit rating agencies and the regulation of the domain name industry through the creation of the Internet Corporation for Assigned Names and Numbers. See C. M. Bruner (n 25).

In this perspective, it is important to stress that, due to the inexistence or ineffectiveness of global institutions and regimes allowing to regulate specific sectors, the establishment of global private players acquires a particular relevance, as it does not only represent an engine of economic expansion but also a proxy for global reach of domestic regulation. It is, therefore, important to keep in mind that delegation of regulatory functions to private intermediaries may allow to find efficient and effective solutions to regulate specific policy areas,²⁸ but we must recognise that efficiency and effectiveness are not synonyms of justice and rule of law.²⁹ In this context, while experimentation with private ordering can be very beneficial for efficiency and effectiveness purposes, ultimate oversight can only be public, if one wants to guarantee that fundamental rights, due process and the rule of law are respected.

While this section has argued that, over the past decades, dominant state actors may have utilised large private actors as regulatory proxies, the next section aims at moving a step further, analysing why social media platforms may successfully exploit their structural power to acquire a set of capabilities that are normally seen only in sovereign nations. These features were likely promoted by governments facilitating the establishment of such technology companies as a strategy to assert global jurisdiction by proxy, but may now have given rise to entities that are not even controllable by such governments and are concretely trying to assert their own private sovereignty.

The next section will argue that digital platforms can be seen as private cyber-sovereigns, able to establish private ordering systems within the digital frontiers delineated by their software architectures. Indeed, the structure they define allows them to enjoy quasi-normative, judicial and executive power, which underpin their private sovereignty.

III. Private ordering to structure digital platforms' sovereignty

As digital platforms are increasingly omnipresent in our personal and business lives, public debate and policymakers' attention is increasingly turning towards the role that these intermediaries play, the influence they exercise, and how they do so. While it may seem an overstatement to argue that social media platforms behave as private sovereign, this section

²⁸ See OECD (n 14)

²⁹ L. Belli, P.A. Francisco and N. Zingales (n 5)

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will illustrate that, in many ways, these private actors have integrated many functions previously reserved to state actors. Furthermore, the way platforms structure their contractual norms, technical architectures and interfaces may be seen as a form of structural power, in the conception put forward by Susan Strange.

Importantly, Strange's work offers a compelling argument of why sovereign entities exercise power by defining the structures and substructures based upon which people, corporations, and even states can relate to each other. Exactly as the architect of a labyrinth can define where walls are and which doors can be open or closed, controlling how individuals or animals inside can move, the holder of structural power can define the infrastructural, normative, trade, and communications structures that allow any actor using them to have social, economic, or even political interactions. In this sense, structural power is instrumental to the exercise of sovereignty.

It also important to emphasise that the concept of (digital) sovereignty entails a certain complexity.³⁰ Public law and international relations are grounded on the assumption that states are the only actors having legitimacy to enjoy sovereignty. National and international law are grounded on the assumption that sovereign power is held by the state as the only political organisation able to effectively structure the governance of society. Public law traditionally prescribes that such structure is defined via a set of bodies that exercise the legislative, jurisdictional, and executive powers – supposedly, in an independent fashion while mutually checking and balancing each other.

While Max Weber famously considered that states are “political enterprises”³¹ characterised by “the monopoly of the legitimate use of physical force within a given territory,”³² Carl Schmitt argued that, rather than a monopoly of coercion, the sovereign enjoys the monopoly to decide.³³ These assumptions are core concepts utilised by public law to describe national institutions and governance, but they become less certain when considered from a global and international perspective, rather than a purely domestic one. In this sense, the abovementioned 1997 Framework for Global Electronic Commerce adopted a very pragmatic stance, recognising the

³⁰ Julia Pohle and Thorsten Thiel (n 4); Edoardo Celeste (n 4); Luca Belli (n 4).

³¹ Max Weber, 'Politics as a Vocation' in H. H. Gerth and C. Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1948).

³² *Ibid.*

³³ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (MIT Press 1985) 5.

inefficiency of the regulation set by national sovereigns and the need to rely on private actors to effectively regulate a digital environment designed to be transborder and global.

Hence, since the 1990s, it seems to have emerged an increasing understanding – or at least acceptance – that global phenomena require to update traditional conceptions of sovereignty to fit the emerging role of private actors and their capacity to structure the sectors where they operate in remarkably effective – though not necessary just – fashion. At the global level, indeed, no entity may claim the monopoly of force or the legitimacy to unilaterally establish binding rules, make decisions and enforce them. In this context, private actors have long taken the lead and bridged the gap left by the lack of international public authority, instituting private ordering systems that effectively structure power relations, building private regimes in a wide range of sectors, spanning from finance to organised crime.³⁴ It is precisely recognising these characteristics that, as convincingly argued by Bruner, “hegemon governments” may opt to regulate indirectly – or by proxy³⁵ – issuing instructions to less powerful States via private standard setters.³⁶

By nature, the Internet environment and, particularly, its application layer, which is largely composed of privately developed software platforms, lends itself very well to the surge of private authority to provide law and order. Indeed, the very commercialisation of the Internet was driven by the belief that “the private sector should lead”³⁷ the expansion of electronic commerce over the Internet on a global basis. In this light, it is not a surprise that the digital platforms that populate cyberspace have long established private ordering mechanisms. While not necessarily compatible with democratic values and fundamental rights principles,³⁸ private ordering is a more efficient and reliable option for private actors, but also more diplomatically convenient for the “hegemon governments” of the day willing to globally regulate the online world, rather than relying on unilateral imposition of domestic norms or ineffective intergovernmental institutions.

³⁴ R. B. Hall and T. J. Biersteker (eds) *The Emergence of Private Authority in Global Governance* (Cambridge University Press 2002).

³⁵ L. Belli, P.A. Francisco and N. Zingales (n 5).

³⁶ See C. M. Bruner (n 25).

³⁷ See B. Clinton and A. Gore (n 26).

³⁸ See particularly, Luca Belli and Nicolo Zingales ‘Platform value(s): A multidimensional framework for online responsibility’ (2020) 36 *Computer Law & Security Review* <<https://doi.org/10.1016/j.clsr.2019.105364>> accessed 22 July 2021

The initial ineffectiveness of state coercion and difficulty to enforce the law in the digital environment have prompted, on the one hand, the state to rely on private players as a proxy of national legislation and, on the other hand, digital intermediaries to fill the gaps left by the state ineffectiveness, by establishing contractual regimes and technical architectures aimed at effectively regulating individual behaviours online.

From this perspective, the technical architectures on which social media platforms rely for their function may be seen as digital “territories” on which platform exercise their private sovereignty. Such territories are populated by individuals that must abide to the rules of the platforms, and where justice is given via adjudicating systems and decisions that are implemented via enforcement mechanisms unilaterally established by the private entities exercising “sovereignty” within the digital frontiers delineated by the platform’s technical architectures.³⁹

A. Quasi-normative power

Each social media platform that we utilise typically regulates the behaviour of its users through “Terms of Service” or “Terms and Conditions”. The main feature of these standard contracts – commonly referred to as adhesion contracts or boilerplate contracts – is that the conditions they include are not negotiated.⁴⁰ On the contrary, the contractual clauses are unilaterally pre-determined by one party, which is the platform provider, in our case. While, terms of service are legally considered as any other contract, signifying the expression of the willingness of all the party, it is natural to consider this contractual typology as the quintessential expression of one-sided control.

For this reason, standard contracts are recurrently criticised,⁴¹ due to the unilateral character of the provisions, the absence of negotiation between the parties, and the quasi-inexistence of the bargaining power of the adhering party. In this sense, the position of platform users – especially those of dominant platforms – is remarkable vulnerable, as assenting to the unilaterally established contractual regulation is the only option they may have to utilise

³⁹ See L. Belli (n 11) 202, 219.

⁴⁰ See the seminal work of O. Prausnitz, *The standardization of commercial contracts in English and continental law* (Sweet & Maxwell 1937).

⁴¹ See most notably: M.J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2012); N.S. Kim, *Wrap Contracts: Foundations and Ramifications* (Oxford University Press 2013).

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service that, in some cases, may be vital. This seems to be particularly the case with dominant social media networks, notably in low or middle income countries, where acceptance of these platforms' contractual conditions may occur purely out of "powerlessness and resignation"⁴², and fear that otherwise one may be socially excluded.⁴³

Indeed, due to important network effects triggered by those platforms, which are remarkably maximised by the fact dominant social networks are the only apps to be "zero rated"⁴⁴ – i.e. the data consumption related to such applications is not considered in the mobile access plan of users – in virtually all low and middle income countries.⁴⁵ Hence, in countries where everyone "is on the platform", as they are the only subsidised means of communication, it is even more difficult for a user to "take it or leave it", as the only option is to accept the conditions and users have no say about the contractual regulation they are de facto forced to abide by.

Furthermore, it is common practice for social media platforms, to include contractual provisions allowing the unilateral modification of their – already unilaterally established – terms of service without even including obligations to notify users in case of modifications.⁴⁶ This situation, which has been tellingly described by Shubha Ghosh as "contractual authoritarianism",⁴⁷ is further exacerbated by the structural power that digital platforms manifest by unilaterally implementing their private ordering through the definition of their digital architectures in a way that exclusively allow users to behave according to the platform will.

⁴²Nora A Draper and Joseph Turow, 'The corporate cultivation of digital resignation' (2019) 21 *New Media & Society* <<https://doi.org/10.1177/1461444819833331>> accessed 22 July 2021.

⁴³ L. Belli & N. Zingales, 'WhatsApp's New Rules: Time to Recognize the Real Cost of 'Free' Apps' (*Medianama*, 16 February 2021) <<https://www.medianama.com/2021/02/223-whatsapp-time-to-recognize-real-cost-of-free-apps/>> accessed 22 July 2021.

⁴⁴ L. Belli, 'Net neutrality, zero rating and the Minitelisation of the internet' (2017) 2 *Journal of Cyber Policy* <<https://doi.org/10.1080/23738871.2016.1238954>> accessed 22 July 2021.

⁴⁵ According to a study crowdsourced in 2018 by the UN Internet Governance Forum Coalition on Net Neutrality, in 98 out of 100 countries surveyed the only apps that are always zero rated are those part of the Facebook group. See Dynamic Coalition on Network Neutrality, 'Zero Rating Map' (*Zero Rating*, 2019) <<http://www.zerorating.info/>> accessed 22 July 2021.

⁴⁶ Already in 2016, a study conducted by the Center for Technology and Society at Fundação Getulio Vargas in partnership with the Council of Europe analysed the Terms of Service of 50 online platforms, highlighting that only 30% of the analysed platforms explicitly committed to notifying users about changes in their contracts; 56% had contradictory or vague clauses, for instance, foreseeing that users will be notified only if the ToS changes are considered as "significant" by the platform; while 12% of the platforms state explicitly that there would not be notification in the event of contractual changes regardless of their relevance. See J. Venturini and others, *Terms of Service and Human Rights: An Analysis of Online Platform Contracts* (Revan 2016) <<http://hdl.handle.net/10438/18231>> accessed 22 July 2021

⁴⁷ See S. Ghosh, 'Against Contractual Authoritarianism' (2014) 44 *Southwestern Law School Review* <<https://www.swlaw.edu/media/2916>> accessed 22 July 2021.

Hence, platforms enjoy a quasi-normative power in the form of a capacity to unilaterally establish the contractual provisions that will regulate the behaviour of their users, defining what activities they are allowed to perform, but also what personal data will be collected about them and how such data will be processed.⁴⁸ The most salient feature of adhesion contracts commonly utilised by platform is indeed that users can only decide to be subject to the pre-established terms.⁴⁹ In this context, the terms of service have the force of a “law of the platform”⁵⁰ or even their “constitution”,⁵¹ which is established and modifiable uniquely by the platform provider.

While the use of contractual regulation is not per se a new phenomenon, the extent to which this is used by digital platforms and social media in particular, and the combination of this feature with an extraordinarily frequent use of user interfaces defined as “dark patterns”, has the potential to enormously expand in scope and scale the impact of such private regulation. Indeed, the relatively new “dark patterns” phenomenon aims at manipulating user behaviour, ultimately, subvert user intent,⁵² via especially deceptive designs. Such design strategies can be seen as a further attempt to structure how users can behave, thus additionally undermining individual autonomy,⁵³ demonstrating the concrete impact on user behaviour of a surreptitious architecture - to use Lessig’s terminology - and how the elaboration and implementation of such architectures allows to exercise structural power. In this sense, the platforms’ monopoly of decision is further configured by the unilateral capability to design interfaces making it impossible – or at least extraordinarily difficult and burdensome – for the user to express a “choice” that is different than the one de facto imposed by the platform.

Lastly, yet importantly, the software architecture and interface defined by the platform provider allows to define in an exhaustive manner the type and quantity of user personal data to be collected. In this sense, if we agree with the authors and institutions that, over the past decade, have incessantly stressed that “data is the new oil”⁵⁴ and that personal data are “the

⁴⁸ See L. Belli and J. Venturini (n 2); L. Belli & C. Sappa (n 4).

⁴⁹ See L. Belli and P. De Filippi (n 4); M.J. Radin (n 40); N.S. Kim (n 40).

⁵⁰ See L. Belli, N. Zingales & P.A. Francisco (n 5)

⁵¹ Edoardo Celeste, ‘Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?’ (2019) 33 *International Review of Law, Computers & Technology* 122.

⁵² See A. Mathur, J. Mayer, and M. Kshirsagar (n 6)

⁵³ See Commission Nationale Informatique et Libertés, *Shaping Choices in the Digital World* (2020) <https://linc.cnil.fr/sites/default/files/atoms/files/cnil_ip_report_06_shaping_choices_in_the_digital_world.pdf> accessed 22 July 2021

⁵⁴ The phrase was coined by the British mathematician Clive Humby, in 2006, and was subsequently

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new currency of the digital world”,⁵⁵ a “new asset class”⁵⁶ and “the world’s most valuable resource”,⁵⁷ then we must acknowledge that the power to define the quantity of data that will be collected from every user, de facto equals to the power to levy taxes, paid with personal data. This latter point has been also acknowledged embryonically, in a recent decision of the Italian Competition Authority, AGCM, stressing that data provided to Facebook by its users “represents payment for the use of the service”.⁵⁸

B. Quasi-executive power

Digital platforms can enforce their private ordering through several technical measures. In this sense, the structural power they exercise becomes evident as they enjoy the unique capacity to define the software architectures of that shape the way platforms functions. These software structures have a performative nature, as they do not simply define what behaviours are admitted within a platform, but they operationalise such prescriptions by building a structure that only allows users to behave as prescribed.⁵⁹ Indeed, the labyrinth metaphor, previously utilised to illustrate Susan Strange’s concept of structural power, is useful to describe also how platforms technical architectures and design interface work. The capability to monitor users, to collect specific types of data about them and to shape their behaviours and interactions is indeed baked into the structure of the platforms.

These features are well known by numerous policymakers that, since at least a decade, have acknowledged explicitly the pivotal role of private intermediaries in advancing public policy objectives,⁶⁰ due to their position of control. The effectiveness of regulating by structure is the main reason why policymakers are increasingly delegating traditional regulatory and police functions to the platforms that design and control digital environments.⁶¹ Such tendency is

made popular by the World Economic Forum 2011 report on personal data. See World Economic Forum, *Personal Data: The Emergence of a New Asset Class* (2011).

⁵⁵ M. Kuneva, ‘Keynote Speech’ (European Commission Roundtable on Online Data Collection, Targeting and Profiling, Brussels, 31 March 2009) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_156>

⁵⁶ See World Economic Forum (n 53).

⁵⁷ ‘The world’s most valuable resource is no longer oil, but data’ *The Economist* (6 May 2017) <<https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>> accessed 22 July 2021.

⁵⁸ Autorità Garante della Concorrenza e del Mercato, ‘IP330 - Sanzione a Facebook per 7 milioni’ (*AGCM*, 17 February 2021) <<https://www.agcm.it/media/comunicati-stampa/2021/2/IP330->> accessed 22 July 2021.

⁵⁹ See L. Belli (n 11) 143-144.

⁶⁰ See OECD (n 14).

⁶¹ See particularly L. Belli, P.A. Francisco and N. Zingales (n 4); L. Belli and C. Sappa (n 4).

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visible in policies stimulating intermediaries' "voluntary commitments"⁶² to regulate and police the platforms and networks under their control, in accordance with the public policy objectives, to avoid being regulated by state actors.

Social media platforms have traditionally tried to avoid liability by "voluntarily" banning content that may be deemed as illicit or "harmful".⁶³ These bans are enshrined – through usually vague terminology – in the platforms' terms of service or "community guidelines" and are subsequently enforced either manually or algorithmically. Manual implementations are conducted by specific platform employees – the so-called "moderators" – who actively monitor users' compliance.⁶⁴ As such, manual enforcement is performed by dedicated teams of individuals that dominant platforms often establish to monitor the activities of users and ensure compliance with the platform's own contractual regulation.⁶⁵ For example, Facebook can remove any content that is determined to violate its contractual conditions thanks to hundreds of reviewers. Any user considered by Facebook as having posted such content may be subject to the suspension or blocking of their account.⁶⁶ The same procedure is established by most platforms, which explicitly foresee the possibility to terminate user accounts without previous notice and without allowing users to challenge the decision.⁶⁷

When establishing the logical architecture of their systems, social media can establish self-performing police functions within the very algorithmic structure of their platforms. As such, the digital structure of the platform is designed to prohibit activities, for example, automatically

⁶² See, for instance, the Code of Conduct on illegal online hate speech, developed by Facebook, Twitter, YouTube and Microsoft, together with the European Commission, which establishes a series of commitments to combat the spread of illegal hate speech online in Europe: 'Code of Conduct on Countering Illegal Hate Speech Online' <http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf> accessed 22 July 2021.

⁶³ See Part IV of this volume. See also Edoardo Celeste, 'Digital Punishment: Social Media Exclusion and the Constitutionalising Role of National Courts' [2021] *International Review of Law, Computers & Technology* 1.

⁶⁴ As an example, in May 2017, Facebook announced the adding of "3,000 people to [Facebook's] community operations team around the world -- on top of the 4,500 we have today -- to review the millions of reports we get every week." See M. Zuckerberg, 'Official announcement' (*Facebook*, 3 May 2017) <<https://www.facebook.com/zuck/posts/10103695315624661>> accessed 22 July 2021

⁶⁵ As an instance, Facebook recently announced that, during March 2021 alone, removed more than 1,100 accounts tied to spreading deceptive content in a variety of countries as part of its effort to root out disinformation efforts. See Facebook, 'March 2021 Coordinated Inauthentic Behavior Report' (*About Facebook*, 6 April 2021) <<https://about.fb.com/news/2021/04/march-2021-coordinated-inauthentic-behavior-report/>> accessed 22 July 2021

⁶⁶ See Facebook, 'Terms of Service' (2021) <www.facebook.com/policies/?ref=pf> accessed 22 July 2021

⁶⁷ As an instance, such provisions can be found in 88% of the platforms analysed by the study on Terms of Service and Human Rights, conducted by the Center for Technology and Society at FGV, which has also demonstrated that none of the analysed platforms commits to notifying users before proceeding with account termination. See J. Venturini and others (n 48).

filtering out copyrighted material or paedo-pornographic content.⁶⁸ Facebook's strategy to tackle misinformation tellingly exemplifies how technology is utilised, and how technology can be combined with human efforts to implement contractual provisions, but it also illustrates the limits of such efforts. Conspicuously, the social network's most recent Community Standards Enforcement Report explains that

“when we fight misinformation, we use a combination of technology and human review by third-party fact-checkers. When it comes to articles, we use technology to, first, predict articles that are likely to contain misinformation and prioritize those for fact-checkers to review. Second, once we have a rating from a fact-checker, we use technology to find duplicates of that content.”⁶⁹

However empirical evidence of automated technology erroneous decisions and over-removal is abundant.⁷⁰ Indeed, automated technology cannot be implemented at scale as only humans can understand the nuanced way humans communicate and the difference, for instance, between satire and threats.

Hence, while the definition of the platforms' software architectures is largely utilised to implement platforms policies and assert platforms' monopoly to decide within their digital frontiers, it seems hard to claim that such tools is exempt from critique, notably regarding their full compatibility with due process and other fundamental rights principles.

C. Quasi-judicial power

It seems also relevant to remind that platforms can put in place alternative dispute resolution processes, adjudicate disputes between users based on their self-defined contractual regulation, and subsequently implement the results of the adjudication via technical means.⁷¹ Online Dispute Resolution (ODR) is a form of alternative dispute resolution increasingly

⁶⁸ See Frosio in this volume.

⁶⁹ See Facebook, 'Seeing the Truth' (*About Facebook*, 13 September 2018) <<https://about.fb.com/news/2018/09/inside-feed-tessa-lyons-photos-videos/>> accessed 22 July 2021

⁷⁰ For an overview of tools and techniques utilised to implement “takedowns” of illicit content, exploring mistakes “made by both ‘bots’ and humans,” see J. M. Urban, J. Karaganis and B. L. Schofield, 'Notice and Takedown in Everyday Practice' [2017] UC Berkeley Public Law Research Paper No. 2755628 <<https://ssrn.com/abstract=2755628>> accessed 22 July 2021. The Electronic Frontier Foundation has also provided a useful compilation of erroneous automatic implementations of social media terms of services in its online repository: 'TOSsed Out' <<https://www.eff.org/tossedout>> accessed 22 July 2021

⁷¹ See L. Belli (n 8) 202-209; L. Belli and J. Venturini (n 2)

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adopted by social media platforms as it takes advantage of the efficiency and transborder nature of digital technologies. These systems are generating increasing interest from a wide range of stakeholders and, in 2019, the Coalition on Platform Responsibility of the United Nations Internet Governance Forum (IGF) has elaborated a set of Best Practices on Platforms' Implementation of the Right to an Effective Remedy, which may be seen a multistakeholder efforts to foster a responsible use of such ODR tools by digital platforms.⁷²

ODR systems are far from being a novelty and, as an instance, ecommerce platform eBay already pioneered ODR in 1999. Since the late 1990s, the platform has invited its users to voluntarily settle their disputes, by offering assisted negotiation software, initially developed by the start-up SquareTrade.⁷³ In case a settlement could not be reached, the claim escalated to adjudication while the sum involved in the disputed transaction was frozen, thus ensuring the enforcement of the final decision.⁷⁴

Facebook has been researching on ODR systems for several years and, in 2016, it begun offering its users some software tools to resolve disputes over offensive posts, including insults and upsetting images. The social media network created message templates that facilitate users attempt to explain the reasons why they wish to have some specific content removed. For example, users can select options, such as "it's embarrassing" or "it's a bad photo of me," and they are also asked to state how the content they object made them feel, such as angry, sad, or afraid, as well as the level of the emotions they report.

Besides these examples, ODR systems have been adopted by a variety of platforms that usually include – or may even impose⁷⁵ – such mechanisms to solve conflicts amongst users based on "the law of the platform". As such, it can be argued that digital platforms do not simply enjoy a

⁷² The Recommendations are structured in four sections exploring the safeguards (a) prior to the adoption dispute resolution measures; (b) in connection with the adoption dispute resolution measures; (c) relating to dispute resolution mechanism; (d) and relating to the implementation of the remedy. See Coalition on Platform Responsibility of the United Nations Internet Governance Forum, *Best Practices on Platforms' Implementation of the Right to an Effective Remedy* (2019) <https://www.intgovforum.org/multilingual/index.php?q=filedepot_download/4905/1550> accessed 22 July 2021

⁷³ See E. Katsh 'ODR: A Look at History –A Few Thoughts About the Present and Some Speculation About the Future' in Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds) *Online Dispute Resolution: Theory and Practice: A Treatise on Technology and Dispute Resolution* (Eleven International Publishers 2011).

⁷⁴ *Ibid.*

⁷⁵ The abovementioned study conducted by the Center for Technology and Society at Fundação Getulio Vargas in partnership with the Council of Europe demonstrated already in 2016 that 34% of the 50 most utilised digital platforms imposed ODR systems as the only method for dispute resolution, in their terms of service. See J. Venturini and others (n 48).

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quasi-normative power to unilaterally define their contractual regulation and the quasi-executive power to unilaterally enforce it technically, but they also enjoy the quasi-judicial power to take decisions based on the how their contractual norms are applied by their self-defined ODR systems.⁷⁶

Probably the only governance element that digital platforms had not dared reproduce within their private ordering structures was a supreme court. As of 2020, however, as Part IV of this volume will analyse in depth, this taboo has been lifted, thanks to Facebook new structural power experiment: the Oversight Board, which Mark Zuckerberg himself once defined as “the Facebook Supreme Court”.⁷⁷

IV. Conclusion

The combination of quasi- normative, executive and judicial powers ascribes a particularly authoritative position to social media platforms, concentrating remarkable power in their hands. Importantly, such concentration of private sovereignty does not originate exclusively from the platforms themselves, but can also be regarded as the expression of a consolidate tendency towards the privatisation of traditionally public functions, resulting from public policy. As pointed out previously, many examples already corroborate the tendency to delegate to platforms the design and implementation of – supposedly – efficient solutions to particularly thorny questions, to which policymakers may not be able or willing to answer.

Facebook’s “Oversight Board” is an example also in this sense. Heralded by the social network as an independent entity with a core function of content moderation oversight, the Board is able to “reverse Facebook’s decisions about whether to allow or remove certain posts on the platform”.⁷⁸ The triple purpose of the new supreme body is to hear and judge appeals from users regarding content that the social network has taken down from the platform, to review policy decisions submitted by Facebook to the Board, and to elaborate policy

⁷⁶ For a more detailed analysis of the quasi-judicial power of social media platforms, especially in the context of online content moderation, see Part IV of this volume.

⁷⁷ Mark Zuckerberg initially utilised such formula, most likely regretting it and backpedalling at a later stage. See Tony Room, ‘Facebook unveils charter for its ‘Supreme Court,’ where users can go to contest the company’s decisions’(*The Washington Post*, 17 September 2019) <<https://www.washingtonpost.com/technology/2019/09/17/facebook-unveils-charter-its-supreme-court-where-users-can-go-to-contest-companys-decisions/>> accessed 22 July 2021.

⁷⁸ See Facebook, *Draft Charter: An Oversight Board for Content Decisions* (2019) <<https://about.fb.com/wp-content/uploads/2019/09/draft-charter-oversight-board-for-content-decisions-2.pdf>> accessed 22 July 2021.

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recommendations. Importantly, the Board has been designed to be a global body, with the aspirational goal to define global standards for social networking platforms. The fact that Facebook has established its own supreme court offers rather explicit evidence of the existence of its structural power, including regarding the establishment of new institutions. The establishment of the Board also represents the social media's understanding that such an institution represents the best possible effort to satisfy all "stakeholders", calling for regulation to solve existing problems – or perhaps the best possible strategy to distract them from the elaboration of regulation.

This private "constitutional" effort may signal the willingness to create self-regulation mechanisms able to protect fundamental values and principles. However, it may also be considered a remarkably effective diversion, explicitly conceived to generate attention around a well-structured distraction, while the company maintains its business model unchanged. Indeed, public regulation of what content is admissible or not would almost certainly hamper the business of the social media company, based on the continuous user stimulation to share content – and associated personal data – and the permanent collection of personal and frequently sensitive information about its users. Public regulation outlawing specific content would, consequently, impose censoring such content, obliging companies to impede users from sharing the content and, therefore, losing the data associated to it.

Tellingly, the most controversial content moderation decisions by Facebook usually do not affect censoring problematic content but not censoring it. The decision to maintain even patently false claims by elected politicians or virtually any kind of claims contained in political advertisements is not a decision on which the Board may have any remit as it is a platform policy to maintain content rather than taking it down. This clearly explains the (ir)relevance of the new Board for content moderation purposes, and how meaningfully one truly can expect it to increase the platform's responsibility. While the body and its process deserve credit, the real impact for which it has been designed by its architect is purposely limited.

Furthermore, one should remind that, while private ordering systems may offer interesting solutions to deal with complex online interactions, they are clearly not democratic institutions, accountable to anyone other than their company's shareholders. Considering that social, economic and, ultimately, democratic interactions increasingly depend on digital platforms, and notably on social media, one would expect stronger stances by policymakers regarding

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their regulatory obligations and more resistance to letting platforms be the new private overlords. In this sense, it is surely worth exploring additional mechanisms to enhance digital platforms accountability, as the lack of adequate overview and properly defined – and duly enforced – limits to platform power gives rise to collateral effects such as blatant fundamental rights abuses⁷⁹ and irreversible distortions of competition in the market.⁸⁰

Social media platforms are central to the entire digital ecosystem, which in turn, has become central to, if not indissociably intertwined with, the structure of offline activities. Increasingly, the ways in which platforms operate affect individuals' ability to develop their opinion and personality, shape their offline lives and engage in social, political, and economic interactions. Given the scale of their impact, it is crucial to understand that platforms' architectural and regulatory choices are not neutral. On the contrary, their choices represent a clear example of structural power. The values that drive such choices affect both our personal lives and the functioning of our democracies and markets.⁸¹ The question that should be addressed by future research is therefore a truly constitutional one: what is the most appropriate strategy to subject platforms' private sovereignty and structural power to fundamental rights values, democratic oversight, labour protection and competition regulation?

⁷⁹ In March 2018, the chairman of the UN Independent International Fact-Finding Mission on Myanmar, told reporters that Facebook had played a “determining role” in facilitating the incitement of violence against Rohingya Muslims in Myanmar. According to the UN mission the social network “has substantively contributed to the level of acrimony and dissension and conflict, if you will, within the public. Hate speech is certainly of course a part of that. As far as the Myanmar situation is concerned, social media is Facebook, and Facebook is social media.” See ‘UN: Facebook has turned into a beast in Myanmar’ (*BBC*, 13 March 2018) <<https://www.bbc.com/news/technology-43385677>> accessed 22 July 2021.

⁸⁰ See, for instance J. Crémer, Y.-A. de Montjoye and H. Schweitzer, *Competition policy for the digital era* (Publications Office of the European Union 2019); UK Competition and Markets Authority, *Online Platforms and Digital Advertising* (CMA, 2019).

⁸¹ See Luca Belli and Nicolo Zingales (n 39).