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# THE RESPONSIBILITIES OF PLATFORMS: A NEW CONSTITUTIONALISM TO PROMOTE THE LEGITIMACY OF DECENTRALIZED GOVERNANCE

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The ways in which platforms are governed *matters*. Platforms mediate the way people communicate, and the decisions they make have a real impact on public culture and the social lives of their users. The extent to which this is true is obscured by the discursive work undertaken by platforms to distance themselves from the suggestion that they do any 'governing' at all (Gillespie 2010). But platforms, of course, are not neutral. Their architecture (Lessig 2006) and algorithms (Gillespie 2014) shape how people communicate and what information is presented to participants. Their policies and terms of use are expressed in formally neutral terms but the powers they provide are carefully wielded and selectively enforced (Humphreys 2007). Their ongoing governance processes are shaped by complex socio-economic (van Dijck & Poell 2013) socio-technical (Crawford & Gillespie 2014) structures, and the interplay of emergent social norms (Taylor 2006).

Platforms are also increasingly being coopted in public regulatory projects. Nation states around the world are coming to the realization that the only effective and scalable way to regulate the actions of people on the internet is through online intermediaries (Goldsmith & Wu, 2006). Copyright law provides the most developed example; notice and takedown procedures under the US Digital Millenium Copyright Act are almost a de facto rule of large western platforms; Google alone now receives over 65 Million takedown notices for its search engine results from copyright owners (Google Inc, 2016). Building on the success of copyright law, Governments are increasingly requiring online intermediaries to do more to respond to privacy claims, to disclose information about their users and to block access to content they deem objectionable or unlawful.

Civil society groups, too, are seeing some success in influencing the governance of private networks. The discourse is increasingly framed in the recognition that private firms “should address adverse human rights impacts with which they are involved” (United Nations, 2011). This new language of 'responsibility' (Ruggie, 2008) has been adopted by disparate global groups of state and non-state actors in debates over freedom of speech, rights of individual privacy, and rights to be free from harassment and abuse (Citron, 2014; UNESCO, 2014). Pressure on intermediaries is steadily

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mounting from all sides, including civil society groups that are actively lobbying for intermediaries to resist obligations that would limit freedom of speech (e.g. Kiss, 2014; IPRC 2014; Global Network Initiative 2012).

In legal terms, however, the ways that online intermediaries are governed matters very little. The terms of the social contracts between operators of platforms and their users are formalised as legal contracts that most commonly allocate a great deal of power to the operators. Because terms of service are thought of as private contractual bargains, the law has no established language through which to understand where the limits on private platform governance ought to be drawn (Suzor 2011). In legal terms, the discretion of the platform owner is practically absolute. The language of constitutional rights – freedom of speech and association, requirements of due process and natural justice, rights to participate in the democratic process – has almost no application in the 'private' sphere; constitutional law applies only to 'public' actions (Berman 2000).

In this paper, I propose that the legitimacy of the ways in which the users of platforms are governed should be evaluated against the principles of the rule of law. In particular, I suggest that we should care deeply about the extent to which private governance is consensual, predictable, equal, and fair. The primary requirement of legitimacy for legal systems is that power is not exercised arbitrarily (Dicey 1959, p.188). In this limited, procedural sense, there is good reason to believe that the rule of law is a universal human good – that all societies benefit from restraints on the arbitrary or malicious exercise of power (Tamanaha 2004).

In order to ground the analysis of the legitimacy of contractual governance documents, I examine the legal terms and conditions of fifteen of the largest English-language social media platforms. Each contract was analyzed to identify the extent to which they provided protections for due process interests of users. In all cases examined, the terms of service provided broad, unfettered discretion to platform owners. This is a serious failing from the perspective of the rule of law. Like constitutional documents, terms of service grant powers; but unlike constitutions, they rarely limit those powers or regulate the ways they are exercised.

I argue that a new constitutionalism is needed to protect substantive and procedural rights in a decentralized regulatory environment. Existing conceptions of constitutionalism – the appropriate limits of regulatory power – are insufficient in this context (Black, 1996). Recognizing that intermediaries always exercise some degree of regulatory control over their networks, I argue that some level of decentralization of governance is both inevitable and desirable. It will become increasingly important, however, to ensure that private platforms enforce rules in a manner that is regular, transparent, equally and proportionately applied, and fair (Fitzgerald, 2000; Suzor, 2011). This paper seeks to progress this debate by providing a framework to evaluate the legitimacy of platform governance in practice.

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