Public and Private Law and the Challenges of New Technologies and Digital Markets. Volume I. Regulatory Challenges

Excerpt

Power Beyond the Public-Private Divide on Digital Platforms After *laissez-faire,* Time for Organised Checks and Balances?

Enguerrand Marique, Yseult Marique

Summary

This contribution examines how checks and balances can be organised so that the individual freedom of users in the digital space is protected from the encroachment of platforms. Indeed, platforms are quasi-states which enjoy legislative, judiciary and executive powers. This merging of functions in the hands of one single entity illustrates the failure of the liberal attempt to set up a cyberspace free of sovereign power: Platforms are the new sovereign. Modern thinkers like Foucault and Habermas have examined how sovereigns in the past have seen their powers curtailed and the role that the birth of two distinct spheres, one public and one private, has played in this process. Traditional public economic law builds on this public-private dichotomy, leaving little room to conceptualize hybrids. Yet this paper shows that platforms are such hybrids. Building on an analysis of the activities taking place on platforms, as well as the rights at stake in platform governance, it finds that platforms' immaterial locus is both political and economic, bundling public and private powers. Hence, this paper puts forward the idea that public economic law should seek to develop mirroring hybrid counter-powers. Civil society especially should be conceptualized in the digital space, with its rights, duties and responsibilities, to foster balanced relationships between the various actors present on platforms.

Keywords: digital platforms, regulation, public-private divide, Habermas, Foucault.

1. Introduction

In the wake of the Christchurch massacre in New Zealand, "*[l]eaders and tech firms pledge[d] to tackle extremist violence online*".[1] The search for the sensational by online platforms where the gunman had livestreamed the massacre was met with such a public outcry that platforms and the media had to stop disseminating it. Digital platforms provide services and spaces for users to expand their ways of expressing their political and economic freedoms. Are there limits to this? Who is to set them? How? Where?

In order to ensure sustainable coordination of users' interactions on platforms, operators are the first in line to set norms and limits to users' behaviours, defining what is allowed and forbidden. The successful determination and policing of these norms then allow operators to expand their business models and experiment with new services and forms of interactions. Digital platforms are predicated on a certain level of social stability (among users) coupled with economic expansion (e.g. number of actors, types of transactions etc.). Yet the Christchurch massacre points out that other actors, in the form of states and public opinion, also shape what is and is not acceptable online. Traditionally, the mission of public economic law has been to identify the legal principles ensuring such a balance between political, social and economic powers.[2] This paper builds on this strand to explore which conceptual tools are available today to public economic law to maintain its function.

As a legal field public economic law developed in the 19th century when economic liberalism flourished with the modern industrial area: The state secured free trade for economic actors, restricting the economic role of property held in perpetuity (such as church holdings) to make it flow in the economy. It also limited the economic and social roles that intermediary groups (such as professional organisations, guilds and voluntary groups[3]) played in earlier times. Other intermediary groups such as trade unions and labour organisations would struggle to be recognised during the 19th century, and they have now been very much curbed again after a period of relative blossoming in the 20th century.[4]

[1] See: The Guardian, 15 May 2019, available at https://www.theguardian.com/world/2019/may/15/jacinda-ardern-emmanuel-macron-christchurch-call-summit-extremist-violence-online.

[2] Robert Savy, *Droit public économique* (Paris: Dalloz, 1972).

[3] See Jose Harris, "Development of civil society," in *The Oxford handbook of political institutions*, eds. Rod Rhodes, Sarah Binder and Bert Rockman (Oxford: OUP, 2006), 136–137.

[4] For the stabilizing and transforming role of these institutions at a time when the economic sphere strongly expanded see Poul Kjaer, "From corporatism to governance: Dimensions of a theory of intermediary institutions," in *The evolution of intermediary institutions in Europe*, eds. Eva Hartmann and Poul Kjaer (London: Palgrave, 2015), 20.

This means that the political role of intermediary groups has been strongly marginalised, especially within legal scholarship.[5] Public economic law is thus built on a binary opposition between the "public" and the "private": the ambiguity of these two concepts leaves little space for entities who are neither fully one nor the other (the so-called "hybrids").[6]

This paper asks if the development of new forms of organisations, building on mixes between political and economic powers, such as digital platforms, may not call for a revisited form of intermediary groups equipped with rights and duties that would allow them to act as a new kind of counter-power to digital platforms. Such a suggestion requires discussing the extent to which these intermediary groups could be legally recognised, and with which functions and governance structure, if any.

This paper reads as follows. Section 2 briefly recaps how the public-private divide has been constructed as a starting point for our modern thoughts on public powers and space for discussion on the collective good. Section 3 goes on to analyse how digital platforms crystalize discussions on the public-private divide in terms of defining what they are. Section 4 then applies these findings to the public or private nature of the rights at stake when regulating digital platforms, and Section 5 deals with possible solutions of coping with this problematic divide. This paper then concludes.

2. The traditional public-private divide: Little space for intermediary groupings

The modern conceptualisation of the public-private divide and its political consequences for our contemporary democracies builds on Foucault's and Habermas' work. Their hugely influential writings will only be touched upon here in the limited space available. However, it is worth recalling their debates as this allows for locating the assumptions underpinning the traditional public-private divide and its consequences for the attention given to intermediary

[5] Social and political theories devote more systematic attention to civil society. Yet the relationships between the state, the economy and civil society can be studied from a range of different perspectives with no general consensus (Simone Chambers and Jeffrey Kopstein, "Civil society and the state," in *The Oxford handbook of political theory*, eds. John Dryzek, Bonnie Honig and Anne Phillips (Oxford: OUP, 2006), 363–381.

[6] On this problem in general in administrative law, see Javier Barnes, "The Evolution of Public-Private Divide. A Functional Approach (Regulatory Activities and Public Services)," in *Le futur du droit administratif /The future of administrative law*, eds. Jean-Bernard Auby with Emilie Chevalier and Emmanuel Slautsky (Paris: LexisNexis, 2019 forthcoming).

groupings in contemporary public law scholarship. Foucault and Habermas approach the public-private divide in a complementary manner. Foucault suggests a reading for the birth of this divide and the on-going dynamics between the public sphere and the private sphere. Habermas analyses how a public sphere can develop between the state and citizens as a space where private individuals express their opinions on collective decisions – provided some conditions are met. This section recaps their readings of the dynamics and tensions in modern liberal societies. This allows us to highlight how both Foucault and Habermas leave intermediary groups out of their frameworks, although they differ in how they analyse the public-private divide in many other respects.

In his analysis of the birth of modern societies, Foucault pays detailed attention to power and state coercion. He attempts to explain the birth of a strong state, endowed with extensive powers, sovereignty, authority and the power to punish citizens who do not comply with the norms the state sets. Starting his analysis against the backdrop of Hobbes and the Leviathan, Foucault highlights the sharp distinction between the public and private spheres. The "public," i.e. the state as an organisation, is required to channel violence in society and install a minimum of peace. This is needed to free citizens from the qualms linked to concerns for their physical survival: they can then, among other things, carry out trade and economic transactions. Economic interactions need the state (or at least institutions) to give them security.[7] The state gets in a logic of monopoly – it seeks to maintain and continuously increase its power over time. One way the state does this is through its use of "knowledge" (e.g. statistics to discover more about its population).[8] Foucault calls this state art of steering a course of action and solving problems "governmentality," especially when it comes to governing others in some form. As such, however, "governmentality" is not limited to the state: This term can also be applied to the economy when it performs similar tasks.[9]

In his work Foucault links the "public" with power, especially power exercised to organize social interactions and discipline individuals. He does not have a monolithic approach to the public, however, as the "public" includes the state and its various administrations as much as all the economic transactions happening among economic actors.[10] These economic transactions are public in the sense that they are open to others: economic actors put their goods and services to the public, with no predefined idea about who will buy the good or

[7] Michel Foucault, *Essential works 1954–1984 – Power* (New York: New Press, 2001), 201–222.
[8] Id., 220.
[9] Thomas Lemke, "The birth of bio-politics': Michel Foucault's lecture at the Collège de France on neo-liberal governmentality," *Economy and Society* (30:2) (2001): 191.
[10] Foucault, "Essential works 1954–1984 – Power," 207-08.

service.[11] In general, there is a basic indeterminacy in economic transactions in relation to the potential buyers, the price paid for the goods and when the transaction may happen. Each party seeks her own selfish interest and swaps a good for a price, with not much social interaction arising from this economic transaction (at least when they occur as swap transactions). Things may, however, start to change when economic transactions are maintained for a longer period of time.[12] In this case the parties start to develop specific values such as trust, cooperation and solidarity to ensure that the relationship continues despite arising problems, changing circumstances etc.[13]

On the other side, Foucault develops an extensive, yet differentiated, understanding of what constitutes the private. According to him the private sphere can be understood as an "onion" with different layers: From the more intimate sphere to family and friendship to wider social and economic groups. This private sphere can thus be protected from external encroachments, as the individual has control over who accesses her private sphere, and under which conditions. In this sense individual freedom can be exercised as a shield against undesirable others, including the state.[14] In this scheme both the public and the private spheres are studied from the vantage point of the individual and their more or less openness to others or protection from others. Little is said about groups of individuals coming together and their potential mediation role between the public and private spheres. In a way the social dimension remains at the micro-level. Foucault prefers to study men in relation to things other than men as social groups.[15]

By contrast, Habermas suggests an understanding of civil society more strongly anchored in the publicness of our relationships, in the fact that individuals engage in social interactions because they are basically social animals. From these social relationships among humans emerges a public (or better a social) space where decisions can be discussed among individuals.[16]

[11] Ian MacNeil, "Bureaucracy, Liberalism and Community-American Style," *Northwestern University Law Review* 79 (1984–85): 900.

[12] Ian MacNeil, "Relational Contract Theory: Challenges and Queries Symposium in Honor of Ian R. MacNeil: Relational Contract Theory: Unanswered Questions," *Northwestern University Law Review*, 94 (2000): 881.

[13] Ian MacNeil, "Values in Contract: Internal and External," *Northwestern University Law Review* 78 (1983): 340.

[14] Foucault, "Essential works 1954–1984 – Power," 410.

[15] Id., 208–09.

[16] Jurgen Habermas, "Contributions to a discourse theory of law and democracy," (Cambridge: Polity Press, 1996), 360. Add., Nancy Fraser, "The theory of the public sphere – The structural transformation of the public sphere (1962)," in *The Habermas Handbook – New directions in critical theory*, eds. Hauke Brunkehorst, Regina Kreide and Cristina Lafont (New York: Columbia University Press, 2009), 245.

The next question is to identify how these humans engage with each other in the public space and thus to identify possible rational principles for regulating their discussions and decision-making processes. Habermas wants to develop a wider concept of reason than the rationality pursued by the self-interested man that economic theories have in mind. For Habermas too much attention had been given to progress and technique in the intellectual discussions following WWII in Germany.[17] Habermas aims to develop an alternative to scepticism when he suggests ethical principles for pragmatic actions guiding decisions taken by any groups of humans. For Habermas political legitimacy depends on the fact that decisions are taken "with the agreements of affected parties in possession of far-reaching possibilities to subject them to critical debates."[18] Only this type of process can provide legitimacy to the use of coercive state power. In this sense discussions in the public space are a preliminary step towards the state endorsing the outcomes of these discussions and to using its coercive powers on individuals in a legitimate fashion.

Participants in discussions in the public space have a dual capacity. On the one hand, they act as members of society at large (e.g. employees, consumers, taxpayers or public service users), which Habermas calls a "private capacity." On the other hand, participants are bearers of the political public sphere, which means that they are the people potentially affected by the decisions discussed in the public sphere.[19] For Habermas the two aspects are closely interlinked. The boundary between the public and private spheres is not fixed: it is marked by "different conditions of communication."[20] In order to allow discussions to occur in the public space four principles have to be respected. These are, namely, 1) no power difference between the individuals involved in discussions; 2) all participants have to speak genuinely; 3) equal access to taking part in the discourse for everyone; 4) equality among the participants in expressing their opinions. Only then can discourse in the public space realistically give birth to truth, i.e. a form of socially mediated access to reality.

These conditions have been questioned as in real life it is often difficult to ensure genuinely equal access to the public space. However, Habermas' communication ethics contribute in three ways to our understanding of the public-private divide and its consequences for the law. Firstly, the solution

[17] A topic Habermas will take up again in relation to technocracy and Europe in Jurgen Habermas, "The lure of technocracy" (Cambridge: Polity Press, 2015).

[18] William Scheuerman, "Critical theory beyond Habermas," in *The Oxford handbook of political theory*, eds. John Dryzek, Bonnie Honig and Anne Phillips (Oxford: OUP, 2006), 85.

[19] Habermas, "Contributions to a discourse theory of law and democracy," 364.

[20] Id., 365.

reached within a given public space has the potential to be universalised.[21] Secondly, Habermas offers a link between the rule of law and democracy,[22] in the sense that there is a need for minimal formal rules to allow rational discussion to happen. Thirdly, Habermas focuses on the role of individuals in the public space. He does not expand on the possible role of intermediary groups and associations in the deliberation process.

The state-centred world that Foucault and Habermas were trying to give sense to in the 1960s, 1970s and thereafter is very much changing. Political regimes used to be materialized by buildings and locations, including parliaments (such as Westminster), royal palaces or even prisons (such as the Bastille in France), while the economy used to be represented by trading in goods such as coal, wheat, steel or cars. Many aspects of state control all relied greatly on material aspects of the world and this reliance on tangible objects has deeply affected individuals' perceptions of their surroundings. The digitalisation (together with its accompanying globalisation and emphasis on a service economy) of the economy constitutes a prominent challenge to the public-private divide.[23] This paper proposes to reconsider the political and economic conceptual understanding of the world by cleaning the slate of digital platforms and reconstructing their immaterial locus in our increasingly intangible world.

3. Digital platforms between public forums and private market places

Digital platforms' power has now become undeniable. It comes in many forms. Literature has greatly examined the economic power of platforms.[24] However, this power can also be examined through public law concepts such as authority or sovereignty. Platform operators are indeed exercising some form of authority and sovereignty akin to that which states exercise in the

[21] Laurent Lemasson, "La démocratie radicale de Jürgen Habermas. Entre socialisme et anarchie," *Revue française de science politique* (58:1) (2008): 44.

[22] Id., 47. Habermas, "Contributions to a discourse theory of law and democracy," 118–131.

[23] See Jean-Bernard Auby and Mark Freedland (eds.), *The public law / private law divide: une entente assez cordiale* (Paris: Panthéon Assas, 2004). For a more general academic challenge to the public-private divide, see Dawn Oliver, *Common values and the public-private divide* (London: Butterworths, 1999).

[24] Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, Competition Policy for the Digital Era (Final Report for the European Commission (DG Comp) [March 2019], available at https://perma.cc/BSE6-GTAU.

sense that they hold legislative, executive and judiciary powers.[25] An important distinction, however, is that these powers are concentrated within the hands of a single entity (the board of directors and the employees), rather than exercised under the checks and balances system of many traditional "public" sovereigns (where different bodies exercise parts of each of these functions according to the principle of "checks and balances").[26]

With regard to the legislative branch, platform operators have developed strategies to impose their norms (and potential sanctions) upon users. By choosing a certain platform architecture platform operators channel the behaviours of their users.[27] For instance, Facebook has created a code for users to signal and report content that they identified as fake news.[28] Google has written an algorithm that favours authoritative sources over other sources.[29] Beside coding platforms also have at their disposal contracts and terms of use, which enable them to establish private ordering. Twitter has established a policy around automated applications and activities,[30] while Facebook has also contractually excluded the expression of some schools of thought beyond traditional hate speech (e.g. terrorism). Facebook currently also excludes white supremacism.[31] Mozilla has developed a policy to support users' participation in order to reduce fake news.[32]

With regard to the executive branch, platform operators monitor the content provided by users and remove what fails to comply with their aforementioned policies and private ordering standards. Twitter notoriously banned Infowars (and its head Alex Jones), a US-based conspiracy and fake-news spreading page.[33] Additionally, Facebook has been using fact-checking tools, allowing it to limit the distribution of (or even remove) content spreading hate speech and false stories.[34]

[25] See for instance Clement Salung Petersen, Ulfbeck Salung, Garf Vibe and Ole Hansen, "Platforms as Private Governance Systems – the Example of Airbnb," *Nordic Journal of Commercial Law* (2018): 38–61.

[26] For a discussion and criticism of this approach, see Bruce Ackermann, "Good Bye, Montesquieu," in *Comparative administrative law*, eds. Susan Rose-Ackerman, Peter Lindseth and Blake Emerson (Cheltenham: Edward Elgar, 2017), 38–43.

[27] Lawrence Lessig, *Code 2.0*. (New York: Basic Books, 2006), 38.

[28] Available at https://www.facebook.com/help/572838089565953.

[29] Available at https://www.blog.google/products/search/our-latest-quality-improvements-search/.

[30] Available at https://help.twitter.com/en/rules-and-policies/twitter-automation.

[31] Available at https://www.cbc.ca/news/technology/facebook-ban-hate-speech-1.5073781.

[32] Available at https://www.mozilla.org/en-US/about/governance/policies/participation/.

[33] Available at https://www.nytimes.com/2018/09/04/technology/alex-jones-infowars-bans-traffic.html.

[34] Available at https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/. See also https://www.theguardian.com/technology/2019/apr/18/facebook-bans-far-right-groups-including-bnp-edl-and-britain-first.

With regard to the judiciary branch, platform operators have developed procedures to review conflicts arising amongst the community of users and to decide who is wrong and who is right – i.e. to define the truth. eBay has developed a policy to review complaints regarding online reviews and recommendations.[35] Google has also a seat on the ethics appeal board for advertising (Coalition for Better Ads[36] (CBA)), a committee set up in 2018 by marketing and advertising associations with the aim of bringing national associations together with worldwide operators. This committee has the power to characterize behaviours and impose sanctions, as a judge would do.[37]

This merging of governmental functions in the hands of one single entity means the failure of the liberal attempt to set up a cyberspace free from sovereign power: Platforms are the new sovereign. This raises a crucial question about the platform economy, namely that of the respective roles of public authorities and private actors in shaping the space for individual freedom to flourish. In this regard this contribution examines the alleged monopoly of states over regulating actors by *online* and *offline* means and the hybrid nature of platforms. It considers two arguments supporting the need to reconsider the hybridity of the space created by digital platforms. The first argument (examined in this section) draws on the nature of the actors in the digital space, the second (examined in the following section) builds on the nature of the rights at stake when platform operators regulate interactions between actors in the digital space.

As far as the actors are concerned users are often private actors, while platform operators play a dual function, making them hybrid actors (functionally speaking). On the one hand, nobody would question that platforms are private actors concluding contracts and enjoying freedom to trade. On the other hand, these same platforms can also be assimilated to public administrations in some respects. As this assertion may be a bit less conventional, let us explain how platform operators exercise functions similar to those performed by public bodies.

In terms of the *external dimension* of platform governance (i.e. in relation to the state and third parties) platform operators' activities contribute to those undertaken by public administrations, especially in terms of "the coordination of collective efforts to implement public policy."[38] Every time the platform operator

[35] Colin Rule, "Designing a Global Online Dispute Resolution System: Lessons learned from EBay," *U St Thomas L.J.* (13:2) (2017): 354.

[36] Available at https://www.betterads.org/.

[37] Available at https://www.theguardian.com/technology/2018/feb/15/google-chrome-adblocking-online-ads.

[38] John M. Pfiffer and Robert V. Presthus, *Public Administration* (New York: Ronald, 1953), 4–5.

is delegated a regulatory duty (under mandated regulation or co-regulation) and participates in the public policy, the effort it exercises functions in the same way a public administration would do. For instance, when a French statute compels platform operators to set up a public registry of the sources of sponsored contents funding,[39] they become agents of the French government with respect to enforcing French electoral laws. In this way they act as a central entity which has the technical means (and know-how) necessary to apply the law. The same reasoning can be followed regarding the German Network Enforcement Act, where a platform becomes an agent of the German government when it comes to ensuring the adequate quality of information available to citizens.

One can also look at the *internal dimension* of platform governance from a functionalist perspective. When rooted in the theory of the separation of powers "administration" is also one of the branches of the government. In practice, platform operators behave just as the "administration" (or the executive branch) of the government.[40] Recourse to private ordering/enforcement tools is thus insufficient to conceptualize the role of a platform in the community of users and to make sense of platform governance: Wider, political/collective interests are at stake in controlling undesirable behaviours.[41]

Firstly, the demarcation between the public and the private resides in the pressing need to control undesirable behaviours.[42] As explained above, platform operators feel the need to exert control over their users by both limiting certain behaviours and incentivizing others (such as with reputation systems). If regulation is understood as a collective need to prevent risks and ensure social cohesion (e.g. by limiting harmful behaviours against the platform *and* other users),[43] platforms should fall within the ambit of the public/administrative laws as they try to build communities and ensure social cohesion.

Secondly, public administrations enjoy unique powers in discharging public services for the collective good.[44] This deserves to be broken down into several subsets. The administration enjoys unilateral exclusive power to make decisions with regard to anything affecting members of the public. As shown in consumer protection literature, platform operators have unilateral power to decide upon

[39] *Loi nr 2018-1202, 22 December 2018 relative à la lutte contre la manipulation de l'information*, *JORF* n°0297, 23 December 2018.

[40] Richard Simmons, "Public Administration: The Enigma of Definition," *Social Science*, (45:4) (1970): 202.

[41] Frank J. Goodnow, Principles of the Administrative Law of the United States [Originally Published New York, G.P. Putnam's Sons 1905], 371.

[42] Dewey, "The public and its problems," 15 (as quoted in Simmons, above (40) fn 22).

[43] David Evans and Richard Schmalensee, "Matchmakers: The new economics of multi-sided platforms," Brighton, MA: Harvard Business Review Press, 2016, Chapter 9.

[44] Goodnow, "Principles of the Administrative Law of the United States," 7.

rules, with only limited opportunities for challenges due to a quasi-monopoly situation.[45] Additionally, the need to control the behaviours of members of the public means that decisions have legally binding effects upon on users as well as on third parties.[46] With regard to the notion of public service, the role of platforms in data collection has been compared to the theory of "essential facilities,"[47] i.e. a doctrine acknowledging that access to or use of a (private) infrastructure should be open to anyone according to Fair, Reasonable And Non-Discriminatory (FRAND) terms because of their importance to the public and the impossibility of replicating the infrastructure. The offer of an essential facility is, for the owner of the facility, akin to offering a public service because of the duty to abide by FRAND terms, which precludes them from making excessive profit and delegates upon them the implementation of a public policy.

This essential facility approach is starting to gain momentum at the global level,[48] as illustrated by the acknowledgment that public authorities could not ban users from accessing their Twitter pages (e.g. the president of the USA was compelled to "unblock" users who could not access the information published on his account).[49] Indeed, access to information published on social media by public authorities cannot be restricted: On the one hand, the (private) accounts of public administration figures constitute "public forums" in which users cannot be subject to speech restrictions outside of specific legal situations (cfr. the example discussing Alex Jones above in this section). On the other hand, despite not being the most authoritative source of information, social media accounts constitute a necessary tool for users to obtain up-to-date information on ongoing issues and planned policies, and hence to plan their own life projects

[45] Luca Belli and Primavera De Filippi, "Law of the Cloud v Law of the Land: Challenges and Opportunities for Innovation," *European Journal of Law and Technology*, (3:2) (2012): 1ff.

[46] This is indeed the legal criterion for an administrative decision under some administrative law systems: e.g. England and Wales (*R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815) and Belgium (Cass 13 June 2013, *Pas*., 2013, n° 366; Cass 5 February 2016, not yet officially published). This does not mean, however, that this criterion is shared across legal systems as each legal system may have its own peculiarities. However, administrative decisions have the unique feature of binding third parties without their consent, as an expression of internal sovereignty of the public bodies over citizens – as a rule.

[47] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Wolters Kluwer, 2016); Id., "Tailoring the Essential Facilities Doctrine to the IT Sector: Compulsory Licensing of Intellectual Property Rights after Microsoft," *Cambridge Student Law Review*, (7:1) (2011): 1–20.

[48] Natasha Tusikov, *Chokepoints: Global Private Regulation on the Internet* (Oakland: University of California Press, 2017). See also Crémer, de Montjoye, Schweitzer, "Competition Policy for the Digital Era," March 2019, final report for the European Commission (DG Comp).

[49] See for instance https://www.nytimes.com/2019/03/28/opinion/trump-twitter-lawsuit.html.

and exercise their freedom to choose different courses of actions to realize their life plans.

This approach to platform operators may be criticized on the ground that the economic actors, such as Google, are not monopolistic in nature.[50] Yet, against this criticism, one may respond that as a matter of consensus it seems that platforms evolve in a "winner-takes-all" system. It may not be for lawyers to label economic processes pertaining to platforms and their potential competitors. However, a legal view can be provided on the relationships connecting platform operators and their users in the form of the power that operators exercise within their internal ordering of users. This power relationship puts operators in a monopolistic situation in terms of norm-setting, administering and deciding upon sanctions in the digital spaces with regard to the activities that they operate/manage. Therefore, even if platform operators do not have a monopoly with regard to information supply, they should be regarded as having a monopoly over norms (as in the legal process), which is exactly what the concept of sovereignty means.

Overall, based on the purpose of activities operated by platforms, the need for control, and the essential facilities doctrine, platforms' activities are increasingly taking place in the public realm while being realized by privately held and incorporated companies whose regulatory sole tools are (allegedly) private contracts. Yet users on platforms have so far not been organised into a clear public discussion which would lead to decisions that could feed into the decision-making processes of platform operators. As Habermas once noted, the many discrete chatrooms[51] that are blossoming in the digital space do not count as a proper public space (under his theory): they amount more to noise than to places where proper decisions are taken and they lead to fragmentation of the public discussion spots in such a way that they cannot provide a meaningful counter-power to platform operators. So, in many ways, steering interactions in the digital space, allowing some actions and limiting others, fall to platform operators. Platform operators need to develop their own governmentality practice, i.e. the art of making decisions affecting others.[52]

[50] Mark Jamison, "Should Google be Regulated as a Public Utility," *Journal of Law, Economics & Policy*, (9:2) (2013): 223–250.

[51] Jeff Jarvis, *Public Parts: How Sharing in the Digital Age Improves the Way We Work and Live* (New York: Simon & Schuster, 2011), text before footnote 61 in Chapter "A history of the private and the public."

[52] Discussing the nature of intervention on a platform is left aside in the limited scope of this paper. Regulation of digital platforms has been a strong concern so far as there has been a reluctance among lawmakers to intervene, leaving the means of solving issues on digital platforms to the market or civil society. This means that regulation is mainly undertaken by economic actors through private tools. However, historically, markets have failed to allocate information efficiently, which usually

4. Addressing platform regulation: between public and private tools

Section 3 showed how the merging of governmental functions in one single entity makes platform operators akin to entities holding *sovereign powers*. It also argued that platform operators could fall within the ambit of the notion of "public administration" and therefore be regulated as such. This section considers an additional argument supporting the claim that platforms, albeit private entities, fall within the reach of the "public" by building on the nature of the individual rights at stake when platform operators take decisions impacting on their users.

Rights seeking to protect collective values (such as freedom of expression and its contribution to a debate of general interest) and rights primarily intending to protect private interests (such as privacy) have indeed been systematically clashing with each other when implemented in the platform ecosystem.[53] Despite a lack of definition and consensus on the exact scope of these notions[54] economic freedoms tend to recognize free choice for individuals with regard to work, production, consumption and investment.[55] Whilst economic rights

explains the need for public intervention, notably through intellectual property rules to improve the allocation of intangible resources (Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention. Readings in Industrial Economics* (Springer, 1972), 2019–36; Paul S. Adler, "Market, Hierarchy, and Trust: The Knowledge Economy and the Future of Capitalism," *Organization Science* (12:2) (2001): 216–17; MacNeil also pinpoints this issue of information asymmetry before developing alternative ways to understand long-term contracting based on cooperation (e.g. in "The Many Futures of Contracts," *S. Cal. L. Rev.*, 47 (1973–1974): 726-7; see also above section 2). See also in the context of fake news: https://theconversation.com/le-cout-de-linformation-favorise-les-fake-news-90434. However, regulation of digital platforms by states is also shown to be ineffective (e.g.: National Information Infrastructure Protection Act, United States). See also the many hurdles pointed out in the special issue of the *Revue internationale de droit économique,* No. 2019(3) devoted to issues in the (state) regulation of digital platforms, calling therefore for an alternative/complement to these two approaches.

[53] The distinction between public (collective) and private rights in this sense can be debated and their demarcation depends on different legal cultures across the world. However, in some form, legal systems seem to distinguish between political and civil/economic rights. This reminds us of the type of public/private divide developed in section 2 (above).

[54] For a diverging view of the notion of economic freedom, see Martin Bronfenbrenner, "Two Concepts of Economic Freedom," *Ethics and International Journal of Social Political and Legal Philosophy*, (LXV:3) (1955): 157–170.

[55] https://www.heritage.org/index/about, in the charge of the Index of Economic Freedom, which ranks countries on the basis of the rule of law and regulatory efficiency in a series of factors indicative of economic freedoms. According to the 2019 Index, France and Belgium are considered as "moderately free" while the United Kingdom and the United States are considered as "mostly free." These same rights are recognized under the UN International Covenant on Economic, Social and Cultural Rights of 16 December 1966.

protect the individual in their dealings with the state and other individuals, personal and political rights tend to protect the mental and physical integrity of the individual.[56] However, personal and political rights cannot, in practice, be upheld without the recognition of economic rights and vice-versa.[57] Endless problems arise when political and economic rights conflict in the digital space. No easy solution has been found to these problems yet. To illustrate these issues it suffices here to refer the reader to Susi's Internet balancing formula that attempts to address the conflict between privacy and freedom of speech.[58] Current scholarship seeks to reflect on this need to balance economic freedoms with political and personal rights. Hence this paper does not engage with that debate but focuses on the changes that digital interactions on platforms cause for the respective scopes of these political and economic rights (and the traditional public-private dichotomy) in three main ways.

First, platform operators tend to combine community-building/civil and economic activities, raising issues around the interactions between these respective forms of freedoms. Platforms thus hide behind political/civil freedoms (such as freedom of expression) to uphold their economic freedoms. Alternatively, they hide behind the political rights of their users (their freedom of speech) to enable harmful economic practices (such as fake online reviews) which ultimately provide them with financial gains. In the same vein, privacy has traditionally been used to protect individuals from defamation. In terms of brand tarnishing, freedom of speech is more limited but privacy does not play a major role (whereas intellectual property does).[59] However, privacy is used increasingly as a legal tool to defend economic interests, where previously it was most often used as a personal right conflicting with other political rights (freedom of thought/freedom of speech). This evolving use by platforms to justify regulatory (non) intervention blurs the limits between the public and the private.

For instance, facts can be private, public or a mix of the two. While private information is an "onion," as Foucault explained, and has many layers to be

[56] With regard to civil and political rights, the UN International Covenant on Civil and Political Rights of 16 December 1966 offers an overview of civil and political freedoms: equality for men and women, the right to life, prohibition of torture and slavery, prohibition of arbitrary detention, respect for human dignity, prohibition of imprisonment for inability to fulfil a contractual obligation, freedom of residence, equality before courts and tribunals, freedom of speech, freedom of thought, respect for privacy and family, right of association, the right to vote, and protection of minorities.

[57] Jean Howell, "Socioeconomic Dilemmas of U.S. Human Rights Policy," *Human Rights Quarterly*, (3:1) (1981): 81–82.

[58] Mart Susi, "The internet balancing formula," *European Law Journal* 25 (2019): 198–212.

[59] Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge: Cambridge University Press, 2002), 5–11.

protected, public information does not benefit from the same form of protection as it is deemed essential in a functioning democracy to ensure that a public debate actually exists. However, the dichotomy between "private" (personal) information and public information is easily blurred. Think for instance of online reputation systems. While an online review can be considered as speech for the reviewer, it also contains personal data on the reviewer. It also contains data, akin to reputation, for the reviewee and data which can be widely spread in the general audience (i.e. publicly). While privacy only protects personal (private) information, a potential solution thus needs to bridge both public and private dimensions of information to keep an eye on these new interactions. In the digital space "public" does not mean "in a relationship between individual and the state" anymore but anything that is not held in a private capacity.[60] This new status should not create a setting which makes the protection of privacy impossible, however.

Secondly, the transnational aspect of digital platform translates into increased interactions amongst foreigners who do not have the same understanding of a similar right. Indeed, the right to privacy may seem enshrined in political, personal[61] or economic rights.[62] This recognition depends largely on the cultural and legal backgrounds where the right at stake was developed.[63] This approach will necessarily lead to finding clashes when trying to interpret/construe the meaning and scope of the right in question across borders. In practice, a legal system will indeed protect users based on privacy as an economic freedom while such a user might appear before foreign courts considering this right to be a political one. This may entail that the type of procedural and legal protection available to this person is very different from what she was expecting.

Thirdly, despite claims that platforms should not be involved in politics, the space created enables political exchange *at the same level* as economic transactions. The newsfeed on Facebook can include classified ads for real estate while being immediately followed by sponsored content with political meaning.

[60] Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford: Stanford University Press, 2009), 90–97.

[61] Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review* 102 (1989): 737–807.

[62] Louis Brandeis and Samuel Warren, "The right to privacy," *Harvard Law Review*, 4 (1890): 196–197.

[63] A difference can be seen, for instance, with regard to personal rights, which are non-transmissible in France even post mortem, while they can be transmitted in many other systems (e.g. Belgium, Germany and the Netherlands), see Jean-Michel Bruguière, "« Droits patrimoniaux » de la personnalité – Plaidoyer en faveur de leur intégration dans une catégorie des droits de la notoriété," *Revue trimestrielle de droit civil* (2016): 1, para 6. See also Huw Beverley-Smith, Ansgar Ohly and Agnes Lucas-Schloetter (eds.), *Privacy, Property and Personality: Civil Law Perspectives on Commercial Appropriation* (Cambridge: Cambridge University Press, 2005), 4–11.

The issue is not so much that there is an overlap in solutions but that there is a series of allegations (from platforms and civil society) that each approach (community-based, market-based or regulatory) could suffice to solve the problems arising from the redefinition of the public-private dichotomy, making the issues "their own" rather than discussing them in favour of a single multidimensional framework. The state and the market may indeed have specific roles in disaggregating different aspects of "truth" and ensuring that some of these aspects are "certified" as correct following some specific procedures, guaranteeing a level of competition, disagreement and refinement. The issue remains whether, under information governance mechanisms, truthfulness of information should be left to the market (and financial incentives), to communities (and their political bias)[64] or to the state (with the risk of authoritarianism). Each mechanism thus currently needs to interact with the other ones to keep governance under checks and balances.

Going beyond the public-private divide, the current role of citizens is thus to ask questions of the various providers of information in order to be better informed but also to aggregate the different aspects of regulation when dealing with the platform ecosystem. Through multiplying the lenses through which citizens need to engage with information, and multiplying the situations in which the status of information is blurred, citizens lose sight of the tools available to criticize and ensure fair, reasonable and genuine data. This leads to fragmentation of their social and legal identity, which may weaken their position in holding platform operators to account in a meaningful way. Going beyond the public-private divide thus requires providing online users with integrated/hybrid opportunities to enforce checks and balances mechanisms against platform decisions.

5. Finding checks and balances for platform governments

This section offers an overview of possible ways to get over the public-private divide to guarantee users' freedoms. This approach implies recognition of the power of "users' communities," with their own prerogatives (both rights and duties), and new procedures to establish the responsibility of platform operators.

[64] Maurice Jakesch, Moran Koren, Anna Evtushenko and Mor Naaman, "The Role of Source, Headline and Expressive Responding in Political News Evaluation," (December 2018), available at SSRN: https://ssrn.com/abstract=3306403.

As discussed above in Section 2, Habermas' ethic of communication is key to ensuring discussions in the public space and rests on four key principles for adequate communication, thus, establishing the conditions for social cooperation despite diverging interests among stakeholders. This requires a public discussion to be inclusive and to extend more widely than to a single category of actors.[65] Section 3 has shown that digital platforms can be stakeholders both in terms of private and public powers, and can therefore abide by the first principle by erasing the question of the *difference in nature* of the powers of public and private entities. Section 4 has especially highlighted the need for actors to express their opinions at a similar level of stakes.

The previous sections of this paper have thus shown that the Habermasian principles for proper communication needed to be entrenched when it comes to the functioning of the digital space. This paper asserts, however, that Habermas' key principles require two assumptions to be verified in order to be effective in the digital space. First, the public space must include a diversity of opinions. These opinions can differ in scope and object but need to exist with regard to the purpose of a platform discussion – whether cultural, social, political or economic. This explains why a terrorist group could be banned (as a purely private institution because of its uniformity in political stance) by an Internet blog provider, and why an Airbnb (whose purpose is economic transaction) for Muslims only[66] or a Uber for women only[67] is allowed. This "diversity assumption" or "pluralism" is thus a condition of validity for the public space communication system. States can implement this condition in their media laws. Belgium, for instance, has recognized the need for "ideological pluralism" in the governance of news media as well as in the ideas expressed and shared across news outlets.[68] Other systems imply a similar functioning.[69]

A second assumption in Habermas' theory needs to be clarified: The discussion has to be reciprocal, i.e. all sides *need* to participate *actively* in the debate. There cannot be only emission or reception of opinion on one side. There is a need for a real *exchange* which has the power to transform the opinions of both sides if they listen carefully – this requires time, which the instantaneity of information sharing only does not enable at this stage.

[65] Mark Hunyadi, "Les limites politiques de la philosophie sociale," *Esprit* 8 (2015): 87.

[66] Available at https://www.muzbnb.com/.

[67] Available at https://www.gosafr.com/.

[68] Hugues Dumont, *Le pluralisme idéologique et l'autonomie culturelle en droit public belge – vol. 2 de 1970 à 1993* (Brussels: Facultés universitaires Saint-Louis, 1996).

[69] Ewa Komorek, *Media Pluralism and European Law* (The Netherlands: Wolters Kluwer International, 2013); Andrea Czepek, Melanie Hellwig and Eva Nowak, *Press Freedom and Pluralism in Europe: Concepts and Conditions* (Bristol-Chicago: Intellect Books Limited, 2009).

This approach to online platforms as "public spaces" in which the ethic of communication needs to be recognized entails a series of individual and collective rights (and potentially new duties) for users. For instance, individuals need to be granted some form of right to resist the discourse held on and by platforms,[70] with a right to either object to a rule or to disobey it. As this stands the current format of adhesion contracts in oligopolist markets and self-enforcement by codes does not allow for such rights. This means that other solutions need to be developed, such as individual users being able to get organized in new social entities that can advocate for and sponsor their rights in the digital space, thus becoming organized as intermediary groups in the digital space.

To ensure the effective application of these rights several avenues could be considered. First, independent ethics boards, either at the sectoral level (e.g. social networks, the collaborative economy or search engines) or at a broader scale could be set up, with a right to appeal and an actual power of coercion over platform operators. These boards would include representatives of the main stakeholders. They should base their decisions on ethical grounds of communication rather than merely legal or economic considerations. Secondly, the application of external rules to platforms could depend on the internal structure of these platforms to more or less facilitate the access of minorities to debates. The more inclusive the discourse, the larger platform operators' autonomy would be.

While these assumptions and proposals offer procedural options to facilitate an effective debate, other substantive principles could also be set up. Discussions could be framed within certain purposes to ensure that a solution is found. For instance, a discussion space could enshrine solidarity, trust or a commitment to an *ethic of care* where more attention is given to listening to other participants.[71] Of course, the principle chosen could change from one community to another, according to Walzer's spheres of justice. Letting the community proactively (and freely) choose a conflict-resolution principle in cases of clashing rights can pave the way to a better public sphere environment. Indeed, communities whose members never meet in person may be driven more by a need for trust, while communities whose members have repeated offline interactions might search for care. Other (alternative or cumulative) conditions could be considered to

[70] For an illustration of platform narratives, see Hubert Horan, "Will the Growth of Uber Increase Economic Welfare," *Transportation Law Journal* 44 (2017): 36–106, 76–99; Frank Pasquale, "Two Narratives of Platform Capitalism," *Yale Law & Policy Review* (35:1) (2016): 309–19.

[71] For a discussion of an ethic of care in public-private relationships, see Yseult Marique, *Public-Private Partnerships and the Law – Regulation, Institutions and Community* (Cheltenham: Edward Elgar, 2014), Chapter 5.

ensure the proper functioning of a hybrid platform with public communication purposes, such as principles in cases of crisis or in emergency situations. Here we go back to the core of what governmentality means for Foucault, namely the art of achieving security for people affected by others' decisions.[72] The extra-territorialisation that partly goes hand in hand with digital interactions does not meet the basic physical, social, economic and political need for security that humans experience in their day-to-day lives.

6. Conclusions

This paper analysed how digital interactions challenge the public-private divide, a key concept in our modern societies, as Foucault and Habermas have demonstrated in their respective works. These two authors, however, did not leave much space for hybrids in their conceptualizations of modern societies, while digital interactions occur very much in the form of mixes between public and private forms of powers through the action of hybrid actors blurring the economic and political rights of individual users operating in the digital space.

The merging of governmental functions in the hands of one single entity (namely platform operators and their boards) means the failure of the liberal attempt to set up a cyberspace free from sovereign power. Platforms are the new sovereign. This raises a crucial question about the platform economy, namely that of the respective roles of public authorities and private actors in shaping the space for individual freedom to flourish. In this regard, this contribution examines the alleged monopoly of states over regulating actors by *online* and *offline* means and the hybrid nature of platforms. It considers two arguments supporting the need to reconsider the hybridity of the space created by digital platforms. The first argument draws on the activities of the actors, while the second argument supports the claim that platforms, albeit private entities, fall within the reach of the "public" by building on the nature of the individual rights at stake when platform operators take decisions impacting on their users.

Following these arguments this paper suggests possible ways to overcome the public-private divide in order to guarantee users' freedoms. This approach implies recognition of the power "users' communities" have to regulate activities taking place in the realm of the digital sphere. Such power goes hand in hand

[72] Foucault explores governmentality in lectures to the College de France, which were entitled "security, territory, population" (see Michel Foucault, *Security, Territory, Population – Lectures at the College de France 1977–78* (New York: Palgrave, 2009).

with prerogatives (both rights and duties) and with new procedures to establish the responsibilities of platform operators.

Managing a platform operators' duties already include protecting a space for disagreement and differences of opinion. Looking forward, they should also include techniques to foster interactions based on genuine exchanges and listening to others' needs, concerns or hopes. The inclusion of such social and political awareness in a platform may lead to changes in participants and deeper transformations in the opinions and identities of users. This inclusion needs to be seized on as an opportunity for users to exercise their positive individual freedoms to the full, i.e. not freedom from others' encroachment but freedom to fulfil their potential. To dampen security threats in these transformational processes specific rights adapted to the technological specificities of the digital space would need to mirror the right to resist excesses by the sovereign. Benevolent hacking, whose limits require further ethical and technical developments still to be delineated,[73] could for instance be accepted as long as it contributes to the health of digital interactions.

More systematic attention needs to be paid to these possible excesses, for instance when it comes to sanctions in the digital space[74] and the possible avenues for addressing conflicting rights with proportionality.[75] Here, again, the public-private divide would need to be revisited and is probably calling for more refined and calibrated checks and balances. In this sense the public-private divide may need to take the new dimension that online interactions bring to our offline lives into account. Offline state institutions (such as courts, supervising bodies of digital interactions etc.) and intermediary groups (including those representing offline social interactions) may help with platform governmentality and the development of the conditions set by Habermas to foster discussions in the public space. This would allow each participant to grow their identity as they learn to develop their online and offline activities, maintaining offline islands free from online interactions.

[73] For developments in this direction see Audrey Guinchard, "Transforming the Computer Misuse Act 1990 to support vulnerability research? Proposal for a defence for hacking as a strategy in the fight against cybercrime," *Journal of Information Rights, Policy and Practice*, (2:2) (2018).

[74] Enguerrand Marique and Yseult Marique, "Sanctions on digital platforms – Beyond the public-private divide," *Cambridge International Law Journal* (8:2) (2019): 258–281.

[75] Enguerrand Marique and Yseult Marique, "Sanctions on digital platforms: Balancing proportionality in a modern public square," *Computer Law & Security Review* (2020) forthc.

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