TERMS OF SERVICE ARE NOT CONTRACTS – BEYOND CONTRACT LAW IN THE REGULATION OF ONLINE PLATFORMS

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ABSTRACT

The chapter makes five claims. Firstly, on the descriptive level, terms of online services are not contracts for service in the traditional sense, since they often do not contain any obligations or promises on the side of the providers. Secondly, the question of whether these documents are contracts at all remains open. They always contain some contractual elements (licensing of software and/or content), but primarily set the rules specifying what users are (not) allowed to do, resembling more an exercise of property rights than contracts. Thirdly, the relations between online service providers and their users should be viewed through the lens of

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horizontal/vertical (private/public) relations. Online service providers might be *de lege* private entities, but the type of power they enjoy is public in nature. Fourthly, what should be noticed is their unilateral control of the code and algorithms behind their platforms. The unequal power position they enjoy towards the consumers comes not only from what is written in the terms, but most of all from the unconstrained control of the code. Finally, to mitigate this inequality, consumer law should concentrate not only on the substance of the terms, but predominantly on what the providers *do* with the code and the algorithms, and constrain the exercise of this power in a way that would benefit the consumers. The readers are encouraged to view the paper not as a doctrinal argument that the author would be defensive about, but rather as an invitation to critically reassess the concepts and preconceptions which inform lawyerly reflection about the new digital reality.

1. INTRODUCTION

The objects of inquiry of this chapter are online platforms, specifically Google, YouTube, Facebook and Twitter, and the terms of service of these platforms. The chapter's aim is to argue that terms of service of these platforms are not contracts for service and potentially not contracts at all (section 2). Rather, they should be seen as an exercise of property rights, similar to rules and regulations in physical proprietary spaces. The potential results of this finding, mostly regarding application of consumer law, are elaborated on (section 3). Further, the concepts of normative and factual (in)equality, which have informed the two major corrections of private law – i.e. labour law and consumer law – are used to operationalise the concept of the 'code'[1] in the context of online platforms. It is argued that the owners of an online platform remain in a position of power towards the platform users not only as a result of their unilateral control of the terms of service, but largely because they are currently allowed to unilaterally control the code. If one chooses to regulate this sphere, the regulation should not only take place within the realm of contract law, but rather should be directed at limitations of property rights and freedom of the design and usage of the code (section 4). Finally, potential solutions to the dangers faced by consumers and society at large are sketched out (section 5). Conclusions follow.

This argument might seem surprising, given that the chapter is published in a book concerned with contract law in the digital era. However, the choice is conscious, and to explain it, two remarks should be made. Firstly, the claim 'terms of service are not contracts, but an exercise of property rights' is not

[1] The concept of 'code' is understood throughout the chapter as in: L. Lessig, 'The Law of the Horse: What Cyber Law Might Teach' (1999) 113 *HLR (Harvard Law Review)* 501, 546. Hereafter, the word 'code' is used without quotation marks.

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meant to be prescriptive, but descriptive. It is not argued that they should be regulated as such, nor that such a state of affairs should be evaluated positively. Rather, given the current socio-economic practice and the contents of terms of service under study, such a legal classification seems to be the most accurate. In other words, the aim of the chapter is not to advocate for such a proprietary solution, but to facilitate understanding of the current situation.

The problem of understanding leads to the second remark. There is an agreement in law and technology scholarship that when regulating new technologies, one should do so in a way that minimises the dangers caused by them, without impeding the advantages they offer.[2] What exactly should be seen as a danger and what as an advantage is a political evaluation to be made, but such an evaluation, as well as any concrete prescriptive proposals following it, always presupposes an understanding of the phenomenon. And understanding is not merely knowing facts and data, but is a result of the application of a conceptual framework, a theory, to the facts under consideration. *A contrario*, a lack of understanding might result not only from insufficient data, but also from the application of an inadequate framework to a factual situation. The difference between traditional legal scholarship and law and technology scholarship is that the former had the law as its object of study, while the latter studies socio-technological phenomena from the perspective of the law. Needless to say, the methods of each differ.

New technologies confront lawyers with two types of problems: regulatory and theoretical. The first are specifications of the question: what should be done with the phenomenon under study? The second are one step before: what is it precisely that one is dealing with? Lawyers like order. Lawyers tend to place new phenomena under known categories. Lawyers often 'rush to conclusions', wishing to solve theoretical problems quickly, to be able to move to the regulatory ones. Constitutional lawyers will see constitutional problems wherever they look; law and economics lawyers will see economic relations wherever they look; and contract lawyers will see contracts wherever they look. And that is good. This enriches legal academia. The aim of this piece is not to criticise this. The aim of this piece is to simply offer an alternative view.

2. CONTRACTS FOR SERVICE vs. TERMS OF SERVICE

The purpose of this section is to argue that the terms of service[3] of online platforms are not contracts for service as understood by contract law. Firstly,

[2] See for example: J. Zittrain, *The Future of the Internet and How to Stop It*, Yale University Press, New Haven CT 2008.

[3] These documents occur under different names: 'Terms of Service', 'Terms and Conditions', or simply 'Terms'. However, their contents resemble one another, and they serve similar

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the notions of a 'contract for service' and a 'service' are defined. Secondly, ToS of four internet platforms: Google, YouTube, Facebook and Twitter, are analysed. In short, the argument is that the *essentialia negotii* of a contract for service encompass one party's obligation to supply a service to another party, whereas no clause stipulating such an obligation (or any corresponding right) is present in the ToS under study. Having demonstrated this absence, and in fact an absence of any obligations regarding the service on the side of the service providers, the argument moves to questioning whether terms of service are contracts at all.

2.1. DEFINITIONS – 'CONTRACT FOR SERVICE' AND 'SERVICE'

The Draft Common Frame of Reference[4] defines a contract for service as:

> a contract under which one party, the service provider, undertakes to supply a service to the other party, the client.[5]

Examples contained in the DCFR include: construction, processing, storage, design, information or advice, and treatment. The known distinction between obligations of skill and care, and obligations to achieve a result, are introduced.[6] Despite the lack of a legal definition of a 'service' itself, the general meaning of the word is clear.

Services are about doing something, about performing an action. Unlike in the case of sale, which is about the transfer of an ownership right of goods, a service is not about a transfer of rights, but about one party doing something for another. In providing a construction service one builds something for a client, in providing legal services one gives another person advice, drafts documents and represents him or her in court, in operating a hairdressing service one would cut another person's hair, etc. A contract for service gives rise to an obligation for one party to undertake such an action, and a claim on the side of the other party to have an action performed.

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functions. For this reason, I use the original titles when speaking about particular documents, while when speaking about the phenomenon in general I always use the notion 'terms of service', sometimes abbreviated as 'ToS', for the sake of consistency.

4 Acknowledging that DCFR is politically and academically dormant, I still believe that it serves as a good source of common sense, acceptable for all, legal definitions. Since the purpose of this piece is not to study the law of any particular country, nor is it an exercise in comparative law, but rather to study a social and technological phenomenon through the lens of private law, I find DCFR a compelling choice. However, should there exist a legal system defining a contract for service in a way that undermines the argument of this chapter, I would be more than happy to learn about it.

5 DFCR IV. C.–1:101.

6 DCFR IV. C.–2.

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Moving one's focus from the law books to a smartphone screen, what is it that the online platforms studied here do? Google provides a search engine, which allows the user to search for information on the web. YouTube allows one to upload videos, as well as to watch and comment on videos uploaded by other users. Facebook hosts one's information, provides a means for expression, links people with their friends and facilitates communication. Similarly, Twitter. All four perform functions of high importance for the digital society we currently live in.[7]

However, the first potential terminological confusion should be visible right now. Are Google, YouTube, Facebook and Twitter services in themselves? There is a tendency to call them so, but *de lege* they are not. Ontologically speaking, what one can see is three different types of entity: the platforms,[8] i.e. 'facilities' used to perform the service; services, i.e. the actions performed; and companies owning the platforms and performing the services. As a result, if there is a legal relationship between Facebook Inc. and a particular user, the party to the relationship is Facebook Inc., but the service itself is provided by an automatized platform, the software agent(s) to be precise.[9] There is no actual person – no employee of Facebook Inc. or Google Inc. – placing a photo on one's timeline, or sending one the results of a search request. All this is done by computer programs, owned by those companies. In consequence, the companies can be labelled 'platform owners' where the facilities are concerned (they have proprietary rights over the components of the platforms: servers, software, databases, graphic interfaces etc.), and 'service providers' where the actions performed for the users are concerned.

The substance of the relationship between the platform owners and the platform users is defined by the terms of service. Despite the fact that 'I have read the terms of service …', as the joke has it, happens to be the most often repeated lie on the planet, it is worthwhile to actually study them in detail.

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7 For a good overview of the social and political functions served by the online platforms under study, see the collection: D. Trottier and C. Fuchs (eds.), *Social media, politics and the state: protests, revolutions, riots, crime and policing in the age of Facebook, Twitter and YouTube*, Routledge, New York 2015.

8 Platforms themselves are made up of different types of entity: websites, algorithms, servers, databases etc. Note that the word 'platform' is not a legal concept. Just like a 'user', it is used to refer to particular factual phenomena, but carries no legal meaning, unlike for example a 'service' or a 'consumer'.

9 For a legal conceptualisation of a software agent, see: G. Sartor, 'Cognitive automata and the law: electronic contracting and the intentionality of software agents' (2009) 17 *AI&L (Artificial Intelligence and Law)* 253, 290.

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2.2. TERMS OF SERVICE – GOOGLE, YOUTUBE, FACEBOOK AND TWITTER

Google's Terms of Service open with an assertion:

> Thanks for using our products and services ('Services'). … By using our Services, you are agreeing to these terms.[10]

Right afterwards, they set forward rules clarifying what a user is not allowed to do while using the platform,[11] as well as stipulate the sanction for breaking these rules:

> Don't misuse our Services. For example, don't interfere with our Services or try to access them using a method other than the interface and the instructions that we provide … We may suspend or stop providing our Services to you if you do not comply with our terms or policies or if we are investigating suspected misconduct.

Notably, the sanction is exclusion from the platform. If Google wishes to do so, on the factual level, it will not mean that someone stops doing something for a user, but that a particular user is denied access to the platform.

Further sections clarify the matters of:

- Copyright: not everything displayed by Google is its property; the user obtains no copyright by using the service; the user retains the ownership of his or her content, but grants Google a lucrative licence to use it. This is the first contractual obligation occurring in the ToS, obliging the user.
- Privacy, or in European terminology: personal data protection. The user agrees to Google processing her or his data under specific conditions.[12] The question remains open whether a data subject agreeing to data processing remains in a contractual or administrative legal relationship with the data controller. However, there is no need to dwell on this problem here, given that even if this is a contractual obligation, the obliged party is again the user.

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10 This and further quotations from: 'Google Terms of Service', last modified 14.04.2014, in force as of 21.08.2016: http://www.google.com/intl/en/policies/terms/.

11 'Services', in their terminology. It is interesting to see that the ToS speak of 'using' the services, which is not an expression one would use in case of services typically in law. One does not 'use' the service of a lawyer giving him or her advice, or 'use' a service of a hairdresser. One receives them. What Google's ToS label 'Services' is what has been defined as a 'platform' in section 2.1 above, in order to avoid terminological confusion.

12 Google, just as all the other platforms under study, places a very general clause in the ToS and further specifies the privacy policy in a separate document, which a user also accepts by using the service. 'Google Privacy Policy', last modified 28.06.2016, in force as of 21.08.2016, http://www.google.com/intl/en/policies/privacy/.

– Software licence: Google grants the user a limited licence to install the software necessary to use the platform. This is the first, and only, right granted to the user in the Terms.

These three subject-matters are regulated in all ToS under analysis here. The reason behind this is the binding nature of copyright law and personal data protection law. In other words, they must be clarified for the best interest of the platform owner (service provider). However, they do not say anything about the service itself.

The most interesting part comes next. In the section 'Our Warranties and Disclaimers', Google's ToS state:

> Other than as expressly set out in these terms or additional terms, neither Google nor its suppliers or distributors make any specific promises about the services. For example, we don't make any commitments about the content within the services, the specific functions of the services, or their reliability, availability, or ability to meet your needs. We provide the services 'as is'.

Interestingly, no specific promises are set out in these terms. This section is followed by a series of clauses that make a red light appear in a mind of any consumer lawyer. There is a full exclusion of any liability, an assertion of Google's right to modify the ToS, as well as the service (platform) itself, followed by choice of law (California) and jurisdiction clause (Santa Clara County, California).[13]

Given that the only right conferred to a consumer in the terms of service is a revocable licence to use the software, whatever would be the object of the legal dispute against Google in Santa Clara, it would not arise from contractual obligations, because there are no such contractual obligations.

The terms of service of YouTube,[14] Twitter[15] and Facebook[16] resemble Google's in several ways. They all state that one agrees to the ToS by simply

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13 For a general, but marvellous analysis of the unfair terms regulation, in its historical and comparative context, see: H. Micklitz, 'Unfair Terms in Consumer Contracts' in N. Reich, H.W. Micklitz, P. Rott and K. Tonner, *European Consumer Law*, 2nd edn., Intersentia, Antwerp 2014, pp. 125–164. For a specific study of online platforms' terms of service from the unfair terms regulation perspective, see: M. Loos and J. Luzak, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39 *JCP (Journal of Consumer Policy)* 63, 90.

14 YouTube's 'Terms of Service', last modified 09.06.2010, in force as of 21.08.2016: https://www.youtube.com/static?gl=GB&template=terms.

15 'Twitter Terms of Service', last modified 27.01.2016, in force as of 21.08.2016: https://twitter.com/tos?lang=en.

16 Facebook's 'Statement of Rights and Responsibilities', last modified 30.01.2015, in force as of 21.08.2016: https://www.facebook.com/legal/terms.

using the platform, contain no promises on what the services will actually be, clarify matters of copyright on content (the user keeps it, but gives the providers a licence), software (user receives a limited licence to use the software necessary to use the platform) and privacy matters, exclude liability, and specify the governing law and jurisdiction.

What distinguishes these three platforms from Google, due to their 'expressive' nature (user is enabled to share content, express himself or herself), is the robust regulation of what their users are not allowed to do while using the platforms. The ToS contain some prohibitions themselves (not to spam, not to offend others, not to harass others etc.), but also refer to the 'rules' (in the case of Twitter)[17] and 'community guidelines/standards' (in the cases of YouTube[18] and Facebook)[19], being separate documents containing codes of behaviour for the platforms' users. Violation of these rules results in a user being excluded from a platform and their account being deleted.

'Twitter Rules' forbid violation of intellectual property rights, hate speech, harassment and threats, namely actions that would be illegal regardless of this prohibition. However, Twitter decides to police such actions itself, by removing the content and blocking the user, which is not in all cases required by law. On the other hand, there are also actions that would not be illegal in themselves (like impersonating someone for the purpose of parody, sharing with the public personal information) which Twitter forbids anyhow. Rules of Facebook and YouTube are similar to this extent. They always contain the double-move: the warning to engage in 'private-policing' of illegal behaviour (be it private or public offence, like shaming someone or making threats, respectively); and limitations of acceptable behaviour within the realm of still-legal, but undesirable (by the company) behaviour.

All the ToS, if one includes the other documents they refer to, speak a lot about what one is not allowed to do while using the platforms, and stipulate a sanction (exclusion from a platform), but confer no rights to actually use the platform, or any promises about what the platform will look like or the services will be like. If one compares this to the definition of a contract for service, one should conclude that the ToS, whatever they are, are not contracts for service. Neither Google, nor YouTube, nor Facebook, nor Twitter 'undertakes to supply a service to the other party, the client'. On the contrary, they are quite explicit about the fact that they actually do not consider themselves obliged to do anything.

17 'Twitter Rules', https://support.twitter.com/articles/18311. Unlike terms of service, these documents do not have a date. Last accessed 21.08.2016.

18 Youtube's 'Community Guidelines': https://www.youtube.com/yt/policyandsafety/en-GB/communityguidelines.html. Last accessed 21.08.2016.

19 Facebook's 'Community Standards': https://www.facebook.com/communitystandards. Last accessed 21.08.2016.

That terms of service are not contracts for service has been established. However, if the only right conferred is the licence to use the software, and yet ToS are about many more things than just granting the licence on the software, are they contracts at all? What else would they be?

Twitter's ToS contain a clause:

> All right, title, and interest in and to the Services (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors.[20]

Twitter claims that 'the Services' are its property. Obviously, this does not yet mean this is the case; it only means that Twitter believes so. However, the proposition is an interesting one. Are terms of service an exercise of a property right?

3. ONLINE PLATFORMS AS PROPRIETARY SPACES

The purpose of this section is to argue that online platforms should be viewed as proprietary spaces and that their terms of service should be treated as an exercise of a property right on them, rather than contracts. Firstly, the parallel between using a platform and entering a private space is drawn, in order to demonstrate that by merely using one's property or benefiting from an action that could potentially be considered a service one does not become a party to any contract. Secondly, the consequences of these findings are elaborated, mostly regarding legal limitations on the discretionary power of platform owners (service providers), application of consumer law and private international law. Having demonstrated all this, the argument moves to the claim that just as much as it would be easy to bring terms of service under the consumer law regulation (by e.g. amending the directives' text), the real inequality of power between platform owners and platform users lies not within the realm of contract law, but in the unilateral power to control the code, currently unregulated, enjoyed by the platform owners.

An immediate qualification of the claim 'online platforms should be viewed as property and ToS as an exercise of a property right' is needed. As stated already in the Introduction, it is claimed neither that online platforms should be declared a type of property by binding law, nor that it would be beneficial from a regulatory point of view to treat them as property. The claim is of a theoretical, positive nature, seeking understanding: given the current practice of the platform owners, the current contents of terms of service and the normative

[20] 'Twitter Terms of Service', last modified 27.01.2016, in force as of 21.06.2016: https://twitter.com/tos?lang=en.

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background of both, if one wishes to understand what is going on and why, one should adopt this proprietary perspective.

3.1. 'NO ICE CREAM IN THE BOOKSTORE' – TERMS OF SERVICE AS AN EXERCISE OF PROPERTY RIGHTS

Every student of jurisprudence should be able to answer the question why the 'no vehicles in the park' rule in the H.L.A. Hart's *Concept of Law*,[21] despite its vagueness, was binding and had a normative power. The rule was enacted by a public body, properly authorised to do so by a legal act of a higher rank, again properly enacted by an authorised public body, elected in accordance with yet higher procedural rules … all the way up to the rule of recognition. However, the question would become more complicated if this park were a private park.

Imagine a person enters a bookstore, with a clear 'no ice cream' sign at the entrance. Yet, he holds an ice cream in his hand. The shop owner approaches him and asks the person to leave, which that person agrees to and complies with the request. Should one accept that the shop owner had a right to ask the person to leave her store (though not a right to forcefully remove him, which will be studied in section 4 below), the question is: what was the legal basis of this right? Was it a contractual right or a property right?

To claim the former would be to claim that whenever one enters a private space under some condition, or even without it, or actually whenever one uses someone else's property with the owner's consent, there is a contractual relationship between the user and the owner. This would mean that every time someone lends a pen to a friend, or invites a guest to their house for a beer, there is a contract. However, there is no legal, statutory, judicial or doctrinal, reason to believe that this is a case. The owner of a thing, movable or immovable, may use it as he or she wishes, and exclude others from using it,[22] obviously subject to certain limitations. 'May' is telling here, as opposed to 'must'. It is the owner's right, not an obligation, to allow or exclude others. Similarly, just because an owner does not oppose someone else's usage of his or her property, it would be a mistake to claim that this person has a right to use it, a right arising from a contract. He or she is simply left undisturbed, but has no claim to be left undisturbed. There is no contract.

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21 H.L.A. Hart, *The Concept of Law*, 2nd edn., Oxford University Press, Oxford 1994, pp. 126–130.

22 Exclusion is not always a necessary feature of a property right, as an example of Scandinavian land law demonstrates. However, it is one in a vast majority of cases. For an interesting discussion of the problem, see: G.S. Alexander and E.M. Peñalver, *An Introduction to Property Theory*, Cambridge University Press, Cambridge 2012, p. 4.

There can be a contract, needless to say. Social-economic practice knows of numerous examples. There are contracts for exclusive use of someone's real estate, think of hotels or short-term lending.[23] More importantly, there are contracts allowing access to someone's proprietary space, for example private theme parks, zoos, swimming pools or discos, where one needs to buy a ticket to enter. These spaces would usually have rules and regulations stipulating what one cannot do while being inside the space, as well as specifying a sanction, like a monetary fine or an obligation to leave the space. When one buys a ticket, a mutual legal relationship arises, and its substance would be: 'you can enter my space, stay there for the agreed period of time and use the facilities you find there, and I cannot make you leave (so I grant you a right to be there), as long as you do not violate the rules regulating the space, which you now accept'. Moreover, it can be argued that on the side of the space owner, apart from granting a right to access and stay, there is a certain promise about what the customers (users of the space) will find inside. If the space owner claims that there is a rollercoaster inside the theme park, or a sauna at the swimming pool, or a gorilla in the zoo, and, having purchased a ticket, a customer realises that these entities are missing, one can imagine the customer successfully claiming a refund of the money, simply based on non-conformity with the contract. In short, social-economic practice knows of contracts where the owner of real estate would grant someone a right to access it and stay there for an agreed period of time, as well as make certain promises about what is inside the space, while the consumer would agree to pay the price and abide by the rules, under a sanction of losing the right to be in the space.[24]

The question then arises: when is there a contract and when is there no contract? The easy answer would be: when parties actually conclude one there is one, while when parties do not, there is not. Easy cases are easy to find. When one invites neighbours over for a garden party or allows a friend to sleep at one's home, there is no contract. When one charges a fee for entering an open-air party, or rents out a room at Airbnb, there is a contract. In the former situations the guests have no right to stay when the owner asks them to leave for no reason, in the latter they do. What is the difference between these two situations? One could point to remuneration, or to the economic context, but what actually seems to be decisive is the mutual intention of the parties for a right to access and stay to be granted.

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23 The currently most relevant example is Airbnb, studied in detail above by V. Mak, in this volume.

24 However, just because it is possible, it does not yet mean that there always is a contract. And even if one really wanted to see a contract in ToS, the analysis of their content has demonstrated that there is no description to be treated as a standard for conformity or non-conformity.

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The qualified question arises: does the existence of rules and regulations 'enacted' by the owner automatically give rise to a contractual obligation? The answer seems to be no. Think of a less obvious example, like a shopping mall. A shopping mall is a space where someone would enter in order to potentially conclude a contract of sale or for a service, but it is possible to enter it and stay there just in order to be there (there are people who nowadays seem to enjoy this way of spending their free time). Shopping malls may have rules, for example 'no biking', 'no listening to loud music', 'no shouting'; but the mere fact that these rules are there does not yet mean that as long as someone does not violate any of them, one has a right to stay there. Imagine a group of friends entering a shopping mall and drinking alcohol there. Imagine there is no rule in the regulations prohibiting consumption of the alcohol. However, the owner finds it undesirable and asks them the leave.[25] The reason the owner has a right to do so is because the mall is her property, while the people she speaks to have at no point acquired a right to be undisturbed there.

The final question is: what is the normative status of the rules and regulations? To be specific: is their 'enactment' necessary for the owner to exclude someone from her property? The answer is no (no property law knows of such a limitation), and as a result, one should conclude that the rules and regulations in themselves have no normative value.[26] They are simply an announcement of how the owner plans to exercise her property right. However, as long as there was no contract concluded – which, as was shown, is possible, but not necessary – the owner is not bound by them, either in the negative and positive sense. She does not have to ask someone who violates the rules to leave. And she can still ask someone to leave even if the person does not violate any of the rules. Obviously, her right, as every property right, is not unlimited. There are rules, especially of anti-discrimination law, serving as a limitation of her freedom to exercise the property right. However, she still enjoys a freedom to do whatever the law does not forbid her from doing, and not merely a competence to do only what the law allows her to do. This is still, despite public law limitations, a realm of private law.

Which leads one to the remark: the space owner has a right to ask someone to leave, but has no right to forcefully remove a person.[27] This is a fundamental distinction in the contemporary world. Private persons are given freedom to

25 This would most probably not be done by the owner, but by a security guard or a manager. The simple example of the actual owner doing so is used to avoid complex considerations which are not central to this chapter's argument.

26 The author of the chapter would like to thank Filipe Brito Bastos for pointing this out to him.

27 There are exceptions. Should a person pose an immediate danger to others' life, health or property, the owner, or actually any person witnessing it, would have a right to use a proportional physical force. But if an owner simply does not like the fact that someone does something disturbing in her subjective opinion, she has no right to use force.

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exercise their subjective rights, but the state has a monopoly on executing them. This fundamental distinction is blurred in case of internet platforms, since the use of 'force' in their case does not mean physically interfering with someone's bodily integrity, but simply operations over the code. To give an example: to remove a customer from a tangible shop, the owner would need to physically displace him or her; to remove a customer from an online platform, it is sufficient for the platform owner to click a button within the IT system. This will be studied in more detail in the section 4 below.

If one merges the analysis above with the analysis of the internet platforms, one will observe a similarity. It is possible that to enter and use a platform, one would conclude a contract. This is so, for example, in the case of Netflix or Spotify, who write in their terms of use, respectively:

> During your Netflix membership we grant you a limited, non-exclusive, non-transferable, license to access the Netflix service and view movies and TV shows on a streaming-only basis.[28]

And:

> The Spotify Service and the Content are the property of Spotify or Spotify's licensors. We grant you a limited, non-exclusive, revocable licence to make use of the Spotify Service, and a limited, non-exclusive, revocable licence to make personal, non-commercial, entertainment use of the Content (the 'Licence').[29]

However, from the fact that it is possible that a contract must be concluded before one can enter and use the platform, it does not follow that whenever one enters and uses one, there is a contract.

Two observations should be made. Firstly, the way Netflix and Spotify speak about their platforms is property talk. The latter explicitly claims as much; the former does so implicitly, by granting a user a 'licence'. To grant a licence to use something, one needs to own that something in a first place.[30] This, as has already been said, does not mean that platforms are these companies' property *de lege lata* (though many of their necessary components are: servers, databases, graphic interfaces, software etc.), but it does express how these companies perceive the platforms they operate. Secondly, when a right to access and use is granted in terms of service, these ToS will be treated as a contract (albeit not a

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28 Netflix's 'Terms of Use', last updated 05.05.2016, in force as of 21.08.2016: https://help.netflix.com/legal/termsofuse?locale=en&docType=termsofuse.

29 'Spotify Terms and Conditions of Use', last updated 09.09.2015, in force as of 21.08.2016, https://www.spotify.com/ie/legal/end-user-agreement/.

30 Or have a sub-licensable licence. One way or another, a licence always presupposes an original property right.

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contract for service), while if there are no rights granted, the ToS will be just an announcement of how the platform owner plans to exercise her property right. No more, no less.

One last remark in this subsection should be made about the contractual elements that happen to occur in almost all ToS, those being contracts and those being not, namely: a licence to use the content, a licence to use a software, and privacy agreement (if one sees it as a contract). Should one consider again the bookstore example, one will notice that a customer entering it sees the store and what is inside, while the store's owner sees the customer. Metaphorically speaking: the layout of the store is the 'content', the customer's brain is the 'software', and the shop owner's oversight is the 'privacy'. There need not be any contract, because the whole situation is material, tangible. An internet platform, on the other hand, is highly technologically mediated, in the presence of data protection laws and copyright laws, hence a need for these 'contracts' in terms of service. Their presence, however, does not make these terms contracts themselves.

3.2. CONSEQUENCES OF TERMS OF SERVICE NOT BEING CONTRACTS

Three major consequences follow from the proposition advocated above. Firstly, the limitation on the contents of terms or services will not be equal to limitations on contractual freedom in a given legal order, but to limitations on an exercise of property rights, arguably of a different nature and substance. Secondly, a significant part of consumer law, including the Unfair Contract Terms Directive 93/13[31] and the currently worked on Digital Content Directive,[32] will not apply to them. Thirdly, there are consequences from the point of view of private international law.

Starting with the last consequence, the author of this piece can hardly call himself an expert in private international law. Despite having studied the subject while preparing this chapter, he still does not feel comfortable drawing substantive conclusions.[33] For this reason, he would just like to draw the reader's

[31] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95.

[32] Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM/2015/0634 final – 2015/0287 (COD).

[33] He can, however, recommend a fascinating book on the matter, dealing precisely with private international law and internet, see: D. Svantesson, *Private international law and the Internet*, 3rd edn., Kluwer Law International 2016. See also, D. Svantesson in Part II of this volume.

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attention to the fact that depending on whether an obligation is of contractual or non-contractual nature, different rules of private international law, concerning both choice of law and jurisdiction, will apply. However, what precisely would the difference be, is the question that will remain asked, but unanswered.

Moving to the second consequence, there is a question of the directives' applicability. In their remarkable study on the terms of service of Facebook, Google, Twitter and Dropbox through the lens of the Unfair Contract Terms Directive, Marco Loos and Joasia Luzak, when confronting the question of the Directive's applicability to the terms of service of online platforms, observe:

> The Unfair Contract Terms Directive only applies to contractual terms: Article 2 under (a) of the Directive defines 'unfair terms' as 'the contractual terms defined in Article 3.' The Directive does not elaborate on the notion of a 'contractual term.' … In our view, 'contractual terms' are terms that confer a right or an obligation to one of the parties or otherwise regulate the required behaviour of a party in her contractual relationship with the other party.[34]

Even if one accepts this broad definition as valid, one puzzle remains. Does a term need to be a part of a contractual relationship to be considered contractual within the meaning of the Directive? If so, then one should conclude that the Directive does not apply to terms of service. However, a more favourable reading of this claim is possible, according to which even if the entire relationship is not of a contractual nature, particular terms might still be considered contractual within the meaning of the Directive. If this were the case, liability clauses, jurisdiction and governing law clauses would potentially be under the scrutiny of the Directive. This does seem peculiar, given that the dispute between a user and a platform owner cannot have as its object the non-performance of the contract, since there is no contract.[35] The Directive could potentially be applicable, though. In the end, this is a rather theoretical problem, and as signalled above, a simple amendment of the Unfair Contract Terms Directive, or a new directive, or an ECJ judgment would suffice, if only it would contain the norm 'the Unfair Contract Terms Directive applies to the terms of service of internet platforms'. However, even if the directive applies, either as a result of a favourable interpretation, or as a result of the law's amendment, the most fundamental problem remains, and that is unilateral control of what the platform actually is and does, and in the broadest sense possible, what is happening there.

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34 M. Loos and J. Luzak, above n. 13, 65.

35 Let me once again stress that there *might* be a contract, as is the case regarding Netflix and Spotify. But in the case of the platforms analysed in this chapter, namely Google, YouTube, Facebook and Twitter, as was shown in sections 2 and 3.1., there is no reason to treat them as contracts.

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Loos and Luzak, among the categories of potentially unfair terms in ToS, list 'Unilateral Changes to the Service Itself', stating:

> When consumers conclude a contract with an online service provider, they expect to receive a certain service. If the service provider could unilaterally decide to change this service's scope or nature that could leave a consumer bound to a contract she might not have wanted.[36]

The key phrase here is 'when consumers conclude a contract'. But in the case of Google, Facebook, YouTube and Twitter consumers do not conclude a contract. Platform owners specifically state that they make no promises and come under no obligation as regards the particular functionalities, or even very existence, of their platforms. And the truth is that they do modify their services constantly, which any user of any of these platforms knows more than well. Such a practice is not unfair or unlawful, as long as there is no contract and the legal relationship is simply about allowing others to use one's property. For the very same reason, one should question whether the Digital Content Directive would apply to terms of service, which in article 3.1. states:

> This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data.[37]

The decision to finally start treating personal data as a form of remuneration should be applauded, but the main problem remains. If ToS are not contracts, the Digital Content Directive does not apply. And even if also this were changed in the Directive, so that it would apply as consequence of some rephrasing, in order to achieve the aims stated in article 1:

> This Directive lays down certain requirements concerning contracts for the supply of digital content to consumers, in particular rules on conformity of digital content with the contract, remedies in case of the lack of such conformity and the modalities for the exercise of those remedies as well as on modification and termination of such contracts …[38]

The question that remains unresolved is: conformity with what would be ensured, since not only are no promises made, but also no description is given anywhere in the ToS? And to correct this, something much more fundamental than simply

36 M. Loos and J. Luzak, above n. 13, 72.
37 Proposal for a Directive … above n. 32.
38 Ibid.

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clearing up the applicability of the directives is needed. Platform owners would need to be legally obliged to conclude an actual contract, conferring rights and obligations, with every user, and in this contract specify what the platform will be and do. The consequences of such a legislative move, ranging from freezing innovation to an enormous rise in the cost of running internet platforms, will be left for the reader to contemplate. What seems clear is that this is not an option.

There is a problem, though. The fact that platform owners can essentially do whatever they wish, modify their platforms, exclude people from them, given the social and almost political roles that these platforms play in our society, is troubling. Not only consumers' interest, but the interest of society as a whole is at stake. There is really a lot of uncontrolled power gathered in quite few hands. The solution, however, lies not within the realm of contract law. The solution lies in putting boundaries on the unilateral control of the code. Before one moves in that direction, however, it might be beneficial to refresh an old and dusty concept of horizontal and vertical relations.

4. HORIZONTAL RELATIONS, VERTICAL RELATIONS, AND THE CODE

The purpose of this section is to argue that in order to understand the relationship between platform owners and platform users, as well as potential dangers that consumers and the societies face in the current state of law and practice, one should employ the analytical tool of horizontal and vertical relations. In short, it is argued that these tools can be used to analyse many more spheres of social life than just law; that the difference between legal and factual inequality blurs when the code is concerned; and that this blurring is where the relationship under study dwells. Having introduced the distinction, the argument moves to claiming that a potential regulatory response lies not within the realm of contract law, but in the regulation of the code. Code, being a part of the wider phenomenon of digitalisation, blurs the boundary between normative and factual, and gives platform owners a significantly powerful position towards their users.

4.1. LEGAL AND FACTUAL INEQUALITY

It has become a commonplace in legal academia to claim that the private/public law divide cannot be upheld. There are different arguments for why exactly this is the case – not necessarily consistent with each other – based on divisions according to subject, object or method. There are claims that the law has changed and is no longer private, as well as claims that there cannot possibly be

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such thing as a state-made private law.[39] The view of the author of this chapter is that if it is a common wish to abolish the distinction, it might just as well be abolished, but it should be abolished carefully. When throwing 2000-year-old concepts into the garbage of history, one risks throwing away too much. And the concept that should be saved, given its analytical usefulness, is the concept of horizontal and vertical relations.

Whether a relation is vertical or horizontal depends on the parties' equality or inequality towards one another. A vertical relationship occurs when one party remains in a power position towards the other, while a horizontal relation occurs when the parties' positions are equal. These are, obviously, ideal types, and the social practice will know of more nuanced situations, but defining the ideal types is a necessary first step. There are two types of inequality and equality, and as a result two types of verticality and horizontality, first depending on competences, and the other depending on force. There is a normative[40] (in)equality and a factual (in)equality.

The parties would be normatively unequal if one of them had a competence to unilaterally administer the rules governing the relationship and the rights forming its substance. 'Administer' here means both creating and modifying the rules, as well as adjudicating based on them or enforcing them. In such a vertical relation, the party having the competence to unilaterally administer the rules would be in a power position towards the other one. Examples here, for the moment just from the domain of law, encompass a policemen giving someone a ticket, a tax officer issuing a decision, a judge deciding a case, but also a parliament changing a civil code or a city council enacting local laws.

Normative equality, on the other hand, and so a situation labelled a 'horizontal relation', occurs when none of the parties has a competence to unilaterally administer the rules governing it. Examples here are situations of contract, tort, property and inheritance, so the actions regulated by the branches of law that used to be, traditionally, labelled private law. Note the difference, introduced in the previous section, between exercising a right and executing the right. Clearly, one could argue that in cases of tort law, or *negotiorum gestio*, or property, it is for one party to unilaterally decide on the substance of the relationship via her actions (give rise to rights and obligations). However, horizontality is not defined based on this, but based on administering the rules governing the relationship. In a horizontal normative (here, legal) relation parties cannot change the rules of property law, tort law or inheritance law, nor can they execute a right they wish

[39] For a refreshing and rigorous take on the matter, see: H.W. Micklitz, 'Rethinking Public/Private Divide' in M. Maduro, K. Tuori and S. Sankari, *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge University Press, Cambridge 2014, pp. 271–306.

[40] Why 'normative' and not 'legal'? For, as will be shown shortly, this concept can be used to study many more types of normative systems than just law.

to exercise. They need the legislature and courts (police) to do that, respectively. And both legislature and courts remain in a vertical relation towards the parties to a horizontal relation, which is the reason why procedural law, even civil procedural law, has traditionally been classified as public law.[41]

Normative (in)equality should be distinguished from factual (in)equality. Arguably, the classic legal scholarship[42] of the beginnings of the nineteenth century would take a position according to which normative equality is sufficient to achieve the factual one. In other words, one assumed the other. However, as history soon showed, this is not the case. The reactions to factual inequality occurring within legally horizontal relations were the two major 'corrections' of private law: labour law and consumer law.

The parties would be factually unequal, if due to any extra-legal reasons one of them has a higher chance of influencing the content of the relation (content, not the rules governing it) that is being established between them. Labour law and consumer law know of numerous examples: necessity caused by the life situation of the worker may lead him or her to accept low wages and poor working conditions; information asymmetry, imbalance in bargaining power and a weaker economic position may lead consumers to accept contracts placing them in a clearly disadvantageous position. Hence the need for limitations on the freedom of contract, *ius cogens* norms, pre-contractual information duties, more rights for workers and consumers, work conditions safety and product safety law, etc. The idea, in short, was that modifying legal equality, by essentially creating legal inequality where the factually weaker party is legally stronger, would lead to overall equality of the relations.

Before moving back to the internet platforms, the above-mentioned remark that this tool can be used to analyse many more types of relations than just legal ones, should be elaborated. Consider an example from sport. In a professional football game, players remain in a horizontal 'game-rules' relation towards one another (none of them can change them or enforce them), while they remain in a vertical 'game-rules' relation towards the referee, who can decide on fouls, yellow and red cards, penalties etc. Similarly, in religious situations, if one person lies to another, he or she commits a sin in a horizontal relation towards that person, while he or she remains in a vertical relation towards the priest who can absolve

41 Note that according to this view, the law that governs (establishes and gives substance to) horizontal (private) relations is the private law, while the law that governs vertical (public) relations is the public law. Not the other way round, as would be tempting to claim. In consequence, a relation is not private because it is regulated by private law, but rather because the relation gets established as a private one, the law that regulates it is private law. Personally, the author of this chapter has not ever encountered a good argument against this distinction. However, this problem in itself is not a subject of this chapter.

42 Understood as in: D. Kennedy, 'Three globalizations of law and legal thought: 1850–2000' in D.M. Trubek (ed.), *The new law and economic development: a critical appraisal*, Cambridge University Press, Cambridge 2006, pp. 19, 73.

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him or her from that sin. Students remain in horizontal 'school-rules' relations towards one another, while they remain in a vertical relation towards the teacher or a principal. However, all these are examples of normative (in)equality, where there is no need to use force.

Should one look through these lenses at the phenomenon of internet platforms, one would see two issues, an easy one and a complicated one. Easy is the contract law situation. A starting point it is the legal equality between the persons, the platform owner and the platform user. However, since platform owners are entrepreneurs, have much better information, and in case of Google, YouTube, Facebook and Twitter occupy an almost-monopolistic position, should they wish to conclude contracts with their users, they would be bound by consumer law (obviously, only if the user is a consumer). Hence, the legal position is corrected in order to balance the factual inequality. As was shown above, however, these platforms do not conclude contracts with consumers that often.

A much more complicated issue is what Google, YouTube, Facebook and Twitter do outside of the realm of contract law, and within the realm of the code, where vertical and horizontal 'digital' relations occur. To physically remove someone from one's land, one needs to use force, which power is limited to public bodies. Hence, one needs a party with vertical position to execute the right. In case of internet platforms, platform owners can 'remove' users by simply deleting an account. 'Can' signifies here the factual position (since they control the code) and legal position (since no law forbids them from doing so, and they are still 'private' parties). Digital relations cannot easily be labelled normative or factual, due to very peculiar characteristics of the code itself. It is time to take a closer look at it.

4.2. CODE IS LAW AND ENVIRONMENT – THE BLURRING LINE BETWEEN VERTICALITY AND HORIZONTALITY

The 'discovery' of the code for legal academia, i.e. the description and the conceptualisation of the phenomenon in question, should be attributed to Lawrence Lessig, who distinguished four 'modalities of regulation': law, social norms, market and 'architecture', whereas the code belongs to the last modality.[43] Lessig's argument, in short, was that each of these modalities regulates individuals' behaviour, but also that each of these modalities can be used to regulate another modality. Particularly, law can regulate the behaviour of individuals directly, or indirectly through influencing social norms, or

[43] L. Lessig, above n. 1.

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markets, or the code. The concept has been further elaborated by other scholars, particularly by Roger Brownsword, who in his remarkable work brought the concept into the discourse of private law, as well as highlighting the moral and democratic considerations that should be given to the code, and more generally, technology, as a part of what he calls 'regulatory environment', especially given the move from prescription to (im)possibility as a mode of regulation.[44]

It is not the aim of the author of this piece to summarise the work of these great scholars – the originals serve the purpose better – but rather to make a little contribution to the legal scholarship concerned with the code. It is, on one hand, suggested that legal scholars might benefit from studying code not only as a mode of regulating the behaviour of individuals, but also as a phenomenon shaping the substance of socio-economic relations (which might be vertical or horizontal), and on the other hand it is highlighted that the code is not only a part of the regulatory environment, but also itself forms subjects (software agents) and objects (digital content) to be regulated.

To best understand what is the significance of the emergence of the code for law and legal thought, one should first see what was the conception of the reality assumed by private law before the phenomenon of digitalisation[45] occurred. In short, human beings would get into relations with one another, relations concerning objects (material, made up of atoms; and immaterial, social constructions), and these relations were regulated by the laws of nature (physics, chemistry and biology) as well as social norms (legal, moral and many other types). So there is one layer of 'brute facts',[46] describable by natural sciences: human beings as biological systems, different types of entities made up of matter, and the laws of nature. Then, there is a second layer, of social facts, where human beings would be given statuses (natural person, a corporate body, a judge), create socially constructed entities (rights, money, a company) and regulate their own behaviour through social normative systems (most significantly, but not only, the law).

If one compares the laws of nature to social norms (including law) one will see two differences. Firstly, laws of nature are human-independent.

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44 See in particular: R. Brownsword, 'Whither the Law and the Law Books? From Prescription to Possibility' (2012) 39 *JL&S (Journal of Law and Society)* 296, 308; R. Brownsword, 'The shaping of our on-line worlds: getting the regulatory environment right' (2012) 20 *IJLIT (International Journal of Law and Information Technology)* 249, 272; R. Brownsword, 'In the year 2061: from law to technological management' (2015) 7 *LIT (Law, Innovation and Technology)* 1–51; R. Brownsword, 'Technological management and the Rule of Law' (2016) 8 *LIT* 100, 140.

45 Digitalisation is understood broadly here, as a social and technological phenomenon, caused by rapid development and widespread of information technologies, including personal computers and smart devices, and connecting of these devices through the global internet network, a phenomenon that occurred throughout last two decades.

46 As in: J.R. Searle, *The Construction of Social Reality*, Allen Lane, London 1995, pp. 1–30.

Humans cannot create them; humans cannot change them. They are necessary properties of the world that humans inhabit. Humans might master them, discover them, learn how to use them, but that is all. Social norms, on the other hand, are fully human-made. They are contingent and human-independent. They can be whatever humanity decides them to be.[47] They can be changed.

Secondly, the laws of nature not only cannot be changed, but they also cannot be broken. Social norms, on the contrary, can. Social norms, including law, result in prescription. They state what one *should* do. But they do not make it impossible to undertake an action.[48] One could risk a statement that the reason humans enact laws is because there are some realisations of the physical possibilities that they collectively find undesirable, and so prohibit them or at least regulate them. There are tort rules precisely because it is physically possible for someone to hurt someone else; there are ownership rules because it is possible to take a thing from someone else etc. The positive laws are supposed to inform relations between humans, but they can be broken.

In short, the laws of nature are human-independent and necessary, and result in the possibility/impossibility of an action; social laws are fully man made and contingent (designable), and result in the prescription/prohibition of action, though they do not make an action physically impossible. The code is a mix of these two: it is human-made and contingent (it does not have to be the way it is), though it results in possibility/impossibility of a certain action.

An example well-known to scholars is reading books. Imagine that a library has only one copy of a book one wants to read. However, someone else has checked it out and is reading it right now. It is physically impossible to 'double' the book, so that both persons can read it on the same time. What is possible is for one to borrow the book for half an hour and copy it using the copying machine. Now, whether it is allowed to copy the entire book is a result of the content of the copyright law in the given country (let us, for the sake of simplicity, assume that the law says that it is allowed to copy just one chapter of a book). That is a human-made rule, paired with some sanction, though one is free to break it.

Now, assume that a library purchased access to an online-library, containing that book as an e-book. Currently, numerous people can read it at the same time, but only when connected to the internet, and only on the premises of the library. If one wants to, one can download one chapter of that book to print it. If one goes to a conference and would like to take that book along, one cannot access

47 This is not a positivistic view aimed at criticising natural law legal philosophy. On the contrary, even if one believes there are objective moral standards, as the author of this piece does, and that the law that does not meet the minimum requirements does not deserve to be called law, or even simply is not law, one should note that such 'legal' norms have been enacted and enforced throughout the history. Ergo, it is possible, even if morally wrong.

48 R. Brownsword, 'Whither …' above n. 44.

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the book online from outside of the library, and cannot download and print the whole thing, only one chapter. It is not that this is merely not allowed, it is physically impossible. But it is not impossible out of necessity, it is impossible because someone had designed it this way. It could just as well be designed differently. It could be possible to access the book from wherever (after e.g. providing a password), it could be possible to download the whole book; it was just a decision of the service provider to design it the way it is. And this decision, even if there is a contract, does not need to be written there. It is sufficient that it is incorporated into the code.

This is just one example, but the moment one adopts this perspective, one begins to notice examples basically everywhere in the online platforms. On Facebook: what is displayed on one's timeline, what pages are suggested for one to 'like', the very fact that one can 'like' something or comment on something; all this is just designed this way. On Google: what pops up as a result of a search, what commercials are being displayed, what data Google gathers about its users, none of this is the way it has to be, it is just designed this way. One might dislike it, but one cannot 'infringe it' in the way one could infringe the law or any other social norm.

This might sound trivial, but much more serious examples are not hard to find. Imagine that Google decides not to display a particular type of content (e.g. supporting a particular political party). Or that Twitter decides to block users making some type of claims that are lawful, but inconsistent with the company's policy. Or that YouTube will allow one to upload, but then will not display in search results a particular type of content. Or that Google scans one's emails to know what one is interested in. Or that Facebook scans one's conversations, or keeps one's photos on some server, even after one 'deletes' them. All these actions are not actions that anyone agreed to in any contract for a service, because there is no contract for a service. And so it cannot be regulated by contract law.

At this point one can see what is meant by digital relations. If one person searches another using Google, or comments on someone's video on YouTube, or communicates with someone using Facebook, or argues with someone on Twitter, they remain in horizontal digital relations to each other. What they can do depends on the platform owners, regulating the code. For this reason, platform owners remain in a vertical relation to their users. Additionally, as signalled in the first section, the 'execution' of policies adopted by these companies is not undertaken by human beings, but by artificial intelligence agents, which themselves are 'made of code'.

As a result of all these transformations, the actual ontology of the universe has changed. It is no longer made only of matter 'regulated' by the laws of nature and 'social entities' regulated by social laws. It is now also made of digital entities, and also regulated by the code. However, the freedom that platform owners enjoy while designing the code is hardly limited.

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Apart from the freedom in design of the code, which to a certain extent resembles the 'normative' verticality in which they stand towards their users, platform owners can also 'execute' the code, by for example deleting one's account or blocking access to someone, which resembles rather the 'factual' verticality. Since removing someone from the platform does not require a use of 'physical' force, but of 'digital' force, and the latter is not monopolised by the state, platform owners find themselves in a position that in many ways shares the features that traditionally would be attributed to public power.[49]

5. REGULATING ONLINE PLATFORMS – BEYOND CONTRACT LAW IN CONSUMER PROTECTION

The purpose of this section is to argue that since the dangers for consumers, and for society at large, created by the online platforms owners, result not from potential unfairness of contractual terms or non-conformity with the contracts – since there are often no contracts – but from the unilateral control of the code by the service providers, the potential regulation of online platforms should go not only in the direction of contract law, but primarily towards the regulation of their policies and the control of the code. Firstly, the 'public' concerns, resulting from potential violations of fundamental rights and freedoms are highlighted. Secondly, the potential means of regulating the control of the code are suggested.

5.1. ONLINE PLATFROMS AS PUBLIC PRIVATE SPACES

In the first section it was suggested to look at online platforms as proprietary spaces. Should one think about it, almost all these 'spaces' are privately owned. Yet, very often they serve a 'public' function.[50] Facebook, Twitter and YouTube are spaces of public discourse, with the classic examples of the Arab Spring and current political campaigns.[51] They are forums where people discuss, and sources of information about the world. Similarly, Google, whether one likes it or not, has become a major source of information for a large part of society.

If one broadens the perspective for a while, and thinks of internet platforms not as property, but as mini quasi-jurisdictions, one will see a parallel between the human rights movement that occurred in the nineteenth and twentieth centuries,

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49 For an elaboration of this statement, including more recent examples, see: https://przemyslaw.technology/2016/11/03/facebooks-exercise-of-public-power/.

50 An interesting treatment of the phenomenon, from the constitutional law perspective, is G. Teubner, *Constitutional fragments: societal constitutionalism and globalization*, Oxford University Press, Oxford 2012.

51 D. Trottier and C. Fuchs, above n. 7.

aimed at securing the freedom of speech and association from the intervention of the state, and the current power held by the online platform owners, who also happen to be multinational corporations. As was demonstrated in the first section of the chapter, platform owners not only police actions that are contrary to valid law (like users making threats), but also many actions that arguably would be legal in public spaces. For example, the limitation of free speech or a right to information that goes beyond what was agreed as a result of public political deliberation might be undesirable. The line is not clear. If YouTube or Facebook decide not to allow display of any nudity at their platforms, even for artistic reasons, this might feel legitimate, proportional. However, if they decide not to display some types of political content, this choice might be questionable. Note that even the vocabulary just used: 'legitimate' and 'proportional' echoes the public law way of thinking.

Such policies might be made explicit in the rules (those separate documents referred to by terms of service) and easy to detect, but they might just as well be 'hidden' in the code. This problem will be addressed in the subsection below.

In short, one could argue that some sort of 'proportionality test' for the policies of online platforms is needed. They could be allowed to prohibit more than is prohibited in the public space, but only as long as this does not interfere with the nature of liberties being exercised on these platforms. This is, ultimately, a constitutional law question.[52]

As a result, the question of blocking users from access and deleting their accounts emerges. Currently, online platform owners can do so at their discretion, as an exercise of their property right. However, this property right should not be unlimited. Just as much as there are good reasons to do so (e.g. to prevent hacking, spamming, violating laws), the discretion should be controllable by the same test as signalled above.

5.2. LIMITING THE UNILATERAL CONTROL OF THE CODE

The previous subsection's analysis could be compared to substantive law, while this subsection is concerned with the digital equivalent of procedural law. Just as public bodies are limited not only in their enacting of substantive law, but also in the way they use their monopolised physical force, regulation of internet platforms should concentrate as well on the exercise of the 'digital force'. In other words, if one tried to distinguish normative and factual verticality and horizontality in the control of the code, the previous subsection would be concerned with the former, while this would be concerned with the latter.

52 G. Teubner, above n. 50.

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The major difficulty here results from the fact that the code is 'hidden'. One can study the 'behaviour', but one cannot study the reasons of it. However, regulation on both levels is possible.

One could argue that it is sufficient to monitor the results of the code's functioning. As long as there are no complaints, as long as everyone seems to be content, there is no reason to control how exactly the 'digital force' is used. However, this is based on the assumption that such complaints would be made in the times when the public would generally perceive them as desirable. Another possibility is to actually ask for the disclosure of the source code. This results in numerous problems, ranging from the fact that the code is proprietary (which still could be taken care of by administrative control being obliged to keep it secret), to a much more fundamental problem, that is: the amount of code is enormous, and it is not that easily understandable for humans. Third possibility is to regulate the design of the code *ex ante*, either by creating some standards in the most vulnerable spheres, or by requiring some normative components to be built into the software.

However, this is when the legal analysis reaches its limits and help from political science on one hand, and information technology on the other, are necessary. The first step is to realise that there are new types of dangers, and to understand from the general nature of these dangers a potential way of addressing them. To begin this process was the ambition of this piece. How exactly to solve this problem, is a question for a separate inquiry.

6. CONCLUSIONS

Online platforms might be a relatively recent development, but in one form or another, they are here to stay. The difficulties signalled above will not disappear. They require a careful legal response, based on a good understanding of the phenomenon in question. And it was to slightly improve this understanding that this chapter aimed at.

It has been demonstrated that terms of service of Google, YouTube, Facebook and Twitter are not contracts for service, and that it is possible to argue that they are not contracts at all. Not all terms of service of internet platforms are non-contracts, one can find counter examples; but these platforms show that a contractual relationship between a platform owner and a platform user is not the only possible option. More importantly, even if they were treated as contracts, what could be achieved by amending the existing laws, the most fundamental problems would remain unsolved. These problems result from the fact that the owners of platforms under study do not offer any descriptions and make no promises about these platforms, and so there is nothing they can possibly conform or not conform with. What they do, however, is to treat these platforms

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as their property, what they can do not only *de lege*, but also *de facto*, given their unilateral control of the code and the lack of regulation of the usage of the 'digital force'.

How exactly such a regulation could look like is a question beyond the limits of simply legal analysis. This chapter started with a plea for adopting critical perspective on the analytical framework one uses in order to interpret the reality; and it hereby finishes with a plea for more interdisciplinary dialogue between legal scholars, political scientists and engineers. As stated above, the code is fully designable. One can make it what one wants. However, understanding should always come first. And now it lies on the intersection of several disciplines.

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