

Global platform governance and the internet-governance impossibility theorem

Abstract: According to Princeton University economist Dani Rodrik, global economic governance is characterized by a trilemma: “we cannot have hyperglobalization, democracy, and national self-determination all at once. We can have at most two out of three.” Rodrik’s “impossibility theorem” can also be applied to the area of global internet governance. This paper proposes a corollary *global internet-governance impossibility theorem*: democracy, national sovereignty, and global internet/platform governance are mutually incompatible: we can combine any two of the three, but never have all three simultaneously and in full.

This framework offers us a way to analyze, and evaluate online content-regulation proposals based on the fundamental issue of who sets the rules, and the accountability mechanisms they face (or do not face) in a plurilateral world in which states and corporations continue to be the dominant rule-setting actors.

To demonstrate the utility of this impossibility theorem, this paper evaluates four prominent content-governance proposals: Facebook’s proposal for a global “Oversight Board for Content Decisions”; United Nations Special Rapporteur David Kaye’s human-rights-focused book *Speech Police: The Global Struggle to Govern the Internet*; the United Kingdom’s Online Harms White Paper; and French President’s Emmanuel Macron’s speech to the 2018 Internet Governance Forum in Paris. Of the four, only Macron’s framework offers a pathway to reconciling democratic accountability with the existence of different legitimate views on how content should be regulated. Consequently, efforts at global platform governance should be aimed at ensuring nondomination and interoperability among distinct democratically accountable domestic regimes.

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Global online content regulation, and internet governance generally, represents a “hard” issue in global governance, touching, as it does, on internet governance’s two “third rails”: the normative preference for a global internet and speech issues. At one end of this debate are fears of domestic censorship (by democratic and authoritarian countries) and concerns about the splintering of a supposedly global internet, including disagreements about what type of content should be regulated or even banned. At the other extreme lies concerns about the imposition of global rules by democratically unaccountable American monopolies such as Facebook and Google. Attempts to address these issues have led to a burgeoning cottage industry in regulatory proposals and reviews (see Winseck and Puppis 2019 for a dynamically updated list of current studies and reviews).

The value-laden nature of any exercise in internet governance, to say nothing of the overlapping jurisdictions, conflicting norms and multitude of public and private actors in play, can complicate the analysis of alternate internet-regulation regimes, particularly as they relate to a highly contentious issue like content regulation. However, while global online content regulation may be a “hard” internet governance problem, it is hardly unique in the annals of global governance. Abstracted from the specifics of the issue area in question (speech regulation), online content regulation of a global system represents a contest over two key questions: who will set the rules, and what the rules will be.

As such, it comes up against what Princeton University economist Dani Rodrik calls the “fundamental political trilemma of the world economy” (Rodrik 2010, 200). Applied to the global economy, this trilemma holds that:

we cannot have hyperglobalization, democracy, and national self-determination all at once. We can have at most two out of three. If we want hyperglobalization and democracy, we need to give up on the nation state. If we must keep the nation state and want hyperglobalization too, then we must forget about democracy. And if we want to combine democracy with the nation state, then it is bye-bye deep globalization (Rodrik 2010, 200).

Rodrik’s trilemma starts from the premise that the global norm of democratic accountability should be the fundamental principle against which global economic governance is judged. This choice fits with Braithwaite’s (2017, 1508) observation that “Democracy is virtuous because it can increase freedom, particularly when we conceive freedom as nondomination.” What’s more, the democratic norm is well-suited to the field of economic policy, where, as Rodrik observes, there exist a great deal of uncertainty and disagreement regarding both means and ends (Rodrik 2010, 239).

What is true for an issue like global finance holds also for global platform regulation, especially as it relates to content. Like the global economy as a whole, the global content-regulation sphere consists of divergent and potentially irreconcilable norms and preferences. While messy, focusing on *how* the rules are made, and the extent to which they meet a democratic standard, rather than the extent to which they satisfy some necessarily partial (in the sense of partisan)

measure of freedom, offers us a productive way to evaluate proposed regulatory regimes. This type of measure can allow us to move past near-intractable differences in opinion regarding what “free speech,” for example, should mean.

Because of the similarities between issues of economic and internet governance, discussed further below, this paper adopts Rodrik’s global economic governance trilemma, here recast as a “global internet governance impossibility theorem,” as a means to analyze the desirability of the various proposed platform- (and content-) regulation schemes. It adopts as its evaluative benchmark democratic accountability. This framework prompts us to focus explicitly on the question of who will exercise power in the global political economy, allowing us to classify various internet-governance schemes according to which corner of the trilemma a specific proposal occupies: hyperglobalization and democracy; hyperglobalization and the nation-state; or democracy and the nation-state. In doing so, it offers us a way to analyze and evaluate online content-regulation proposals based on the fundamental issue of who sets the rules, and the accountability mechanisms they face (or do not face) in a world in which states and corporations continue to be the dominant rule-setting actors, and where opinions differ strongly on what the rules should be.

To demonstrate the utility of this impossibility theorem, this paper evaluates four prominent content-governance proposals: Facebook’s proposal for a global “Oversight Board for Content Decisions” (Facebook n.d.; Zuckerberg 2018; Harris 2019b; 2019a; Facebook 2019); United Nations Special Rapporteur David Kaye’s human-rights-focused book *Speech Police: The Global Struggle to Govern the Internet* (Kaye 2019); the United Kingdom’s Online Harms White Paper (“Online Harms White Paper” 2019); and French President’s Emmanuel Macron’s speech to the 2018 Internet Governance Forum in Paris (Macron 2018).

An analysis based on this internet-governance trilemma reveals important aspects of each proposal, most importantly showing how each occupies (or attempts to occupy) a different corner of the trilemma triangle. It focuses on the fundamental issue, from which all normative discussions spring: who will set and interpret rules and regulations related to platform governance. Facebook’s plan offers a global approach to platform governance that does not meet the standards of democratic governance, while effectively forcing nation-states to be passive rule-takers. Kaye’s embrace of international human rights law as the foundation for global platform governance, meanwhile, while attempting to reconcile a global regime with democratic impulses, does not fully consider or resolve the tensions among global platform governance, democracy, and sovereignty. For its part, the Online Harms White Paper chooses democracy and national sovereignty over global internet governance.

Finally, while it remains more a sketch than a fully thought-out plan, Macron’s 2018 speech proposes a formal multilateral agreement on basic democratic, human-rights standards regarding platform governance. This paper argues that in doing so, it offers a way to respect the importance of democratic governance within the context of the internet-governance impossibility theorem, or trilemma. Specifically, it rediscovers the promise of “embedded liberalism” that underwrote the enormously successful post-World War II order by reconciling domestic policy differences and needs with the benefits from multilateral and global, but not unfettered, cooperation. As such it can be seen as the most appropriate framework for considering issues of global platform

regulation, since it prioritizes the interoperability of diverse domestic (and democratically accountable) frameworks.

This paper is structured as followed. The first section briefly considers some proposed evaluative frameworks and offers a justification for the focus on rule-making and democratic norms as the main criteria for evaluating global platform governance proposals. It then sets out in detail Rodrik's trilemma, including the conditions that underlie it, as it applies to online platform governance. The next section of the paper analyzes our four proposals from the perspective of the trilemma. The final section offers some thoughts on what the existence of this trilemma means for internet governance, including and beyond content regulation, going forward.

A. The primacy of structural power

As the above-cited list of inquiries by Winseck and Puppis (2019) demonstrates, the proliferation of different state proposals to regulate global platforms is quick becoming a fact of life. Driven by changing attitudes toward said platforms (Mac Sithigh 2019), the sheer number of these proposals strongly suggest that state regulation is widely considered to be increasingly legitimate and necessary. Among the myriad technical, normative and institutional-design issues raised by platform regulation, two key issues stand out: “whether to proceed on the basis of national boundaries or to think more broadly” (Mac Sithigh 2019), and which actors should be allowed to set the underlying frameworks. The many existing studies on platform governance¹ differ both in their answers to these questions and the extent to which they directly engage with them.

On the question of who should govern, Gillespie (2018) focuses primarily on the normative effects of platforms' moderation decisions, rather than the question of who should be the rule-setter. His heavily US-centred account (which limits its utility for thinking about how to regulate *global* platforms) downplays the role of government in regulating platforms. The book nods toward possible reform of Section 230 of the U.S. *Communications Decency Act*, which grants platforms limited immunity from liability so that (generally speaking) they cannot be held responsible for hosting or removing most types of content posted by their customers. This section effectively allows social-media platforms to set moderation rules as they see fit (barring some exceptions such as for child pornography) to impose some obligations on these platforms (Gillespie 2018, 43). Gillespie's Section 230 reforms involve a combination of individual-focused responsabilization and market-based measures (increasing transparency, greater consumer – here referred to as “users” – responsibility for shaping their platform use) and healthself bromides (companies should adopt more diverse hiring practices). The possibility that states – individually or collectively – could regulate these platforms is pithily dismissed as being too complex (“The biggest platforms are more vast, dispersed and technologically sophisticated than the institutions that could possibly regulate them” (Gillespie 2018, 211)) and too global (Gillespie 2018, 35–36), as if the global domination of a few (American) platforms were an

¹ See the very useful list of resources at <https://socialmediacollective.org/content-moderation-reading-list/> (accessed October 6, 2019).

unchallengable and (in the context of competition from Chinese platforms) even desirable (Wu 2018)² fact of life.³

In contrast, governments feature more prominently in a recent article, Helberger, Pierson, and Poell (2018). This article argues for a governance framework that involves three stakeholders: users, platforms, and governments. That said, governments in their view are not rule-makers, or as they put it “omnipresent regulators”; but rather guarantors of a neutral user-business negotiation framework: “providing the framework for sharing responsibility by all key societal stakeholders” (Helberger, Pierson, and Poell 2018, 10). This approach is seen as ideal because:

As history shows over and over again, unilateral government regulation of public communication tends to sit in tension with freedom of speech. Furthermore, since social media corporations are primarily driven by commercial interests, they cannot be trusted to always act in the interest of the public good either. Nor can we count on the self-monitoring capacities of the crowd, as long as users do not have the knowledge and/or ability to take up such a role (Helberger, Pierson, and Poell 2018, 10).

This formulation of state interests and the role of users is simultaneously overly simplified and overly complicated. In terms of the state, it ignores that the state itself comprises multiple conflicting interests and is not wholly autonomous from society (Cox 1987), and that the form of state (democracy or dictatorship, for example). In other words, talk of a unilateral government tendency ignores the effects of countervailing forces both within the state and between state and society. In terms of rule-making, placing users as equivalent to the state and companies, misses the reality that “users” on their own cannot make rules. Instead, they influence the rule-makers – states and companies – in their roles as voters and consumers, respectively. Downplaying this key point while playing up the role of the state as referee ignores that it is up to the state (or business) to implement any compromise. In other words, the semi-autonomous state is a rule-maker; the extent to which it listens to its citizens (which is what Helberger, Pierson and Poell are calling for here) is a measure of its democratic bona fides.

In both works, global platforms are taken as a fact of life.

In a project that seems to be in generally sympathy with the views of this paper, Suzor (2018) proposes a “digital constitutionalism” approach to evaluating platform-governance proposals. It usefully recognizes that actual governance is conducted by both state and non-state actors (N. Suzor 2018, 2). Digital constitutionalism focuses on the question of governance legitimacy and accountability: “At a minimum, for a system of governance to be legitimate, decisions must be made according to a set of clear and well-understood rules, in ways that are equal and consistent, with fair opportunities for due pr[ocess and (*sp.*)] independent review” (N. Suzor 2018, 9).

This article (and its longer elaboration in Suzor (2019)) are concerned with issues of procedure – “if a government is going to introduce new internet regulation, how should it operate to ensure

² For clarity, Wu is a critic of this position.

³ It is a relief that such fatalism is not evident in the area of global finance, whose complexity, global reach and importance easily matches that of what are effectively online bulletin boards.

that the rules are legitimately enforced?” (N. P. Suzor 2019, 235). However, legitimacy for Suzor (2019), as with Kaye (2019) – as will be discussed below – seems to be primarily about how government content regulation aligns with human-rights law, particularly as it relates to freedom of speech, as opposed to democratic legitimacy:

The most common concerns revolve around freedom of expression and privacy, but any given proposal might involve other rights as well. The common demand we should all have of lawmakers is that rules designed to govern the internet have a legitimate purpose, are reasonably likely to be effective, and don’t go further than necessary to achieve that goal (N. P. Suzor 2019, 238).⁴

1. Dealing with Difference

The debate over how to regulate platforms, who should regulate them, and which values should be championed, is a classic battle over what Susan Strange, one of the founders of the discipline of International Political Economy, called “structural power.” Strange argued that that all human societies, no matter their size, must decide how to prioritize and realize certain fundamental needs: wealth (material), order (security), justice, and liberty (individual) (Strange 1994). Given that differences of opinion on how to achieve these goals will invariably arise, the ability to implement one set of norms over another requires the exertion of “structural power”:

the power to shape and determine the structures of the global political economy within which other states, their political institutions, their economic enterprises and (not least) their scientists and other professional people have to operate (Strange 1994).

This power involves the ability to set the rules and shape the norms faced by other actors. What’s more, in the contest to exert control over the global political economy (or any society), Strange identifies the knowledge structure – the set of rules and norms governing what knowledge is considered to be legitimate, as well as its creation, dissemination and use – as one of four fundamental structures, the others being finance, production, and security. Internet governance and certainly content regulation would fall squarely within Strange’s notion of the knowledge structure (Haggart 2019; 2018; 2018).

For our purposes, two key insights arise from Strange’s analysis. First, we can expect societies to differ in how they prioritize issues such as rules governing speech and internet openness. For example, Powers and Jablonski (2015) highlight the ideological biases that underlie the US-driven discourses supporting “internet freedom,” promoting very particular US commercial and security interests rather than a unalloyed universal good. Such differences do not occur only between societies, but within them; as Franks (2019) notes, the current dominant US discourse

⁴ The Manila Principles on Intermediary Liability (<https://www.manilaprinciples.org/>), a set of proposed rules whose development was led by US-based Electronic Frontier Foundation, India’s Centre for Internet and Society and the UK-based Article 19 (Moody 2015), for example, deal with the content of intermediary law, not *how* the laws are made. This distinction is important because it ends up assuming an equivalence between laws arrived at through democratic processes and those that are not. This paper argues that how a rule is arrived at is as important as the content of the rule itself, especially given the existence of different interpretations of how to regulate platforms.

on “free speech” reflects a particular view of the US First Amendment, rather than the only possible view. These fundamental differences of interpretation of basic concepts mean that it is often not very helpful to begin with an assumption that “openness” or “free speech” should be prioritized, since the real issue is never “free speech or not,” but “what limitations, and in whose favour.” Analyses that begin from an assumption that, say, “free speech” or “internet freedom” should be prioritized (as is the case for many US proposals) will therefore complicate discussions and debates, smuggling in assumptions that are not necessarily shared by all groups or societies. Such an approach immediately puts on the defensive individuals, groups and societies that are more comfortable with, for example, restrictions on hate speech than many American policymakers, academics and activists. Even analyses that attempt to be sensitive to such differences, such as Kaye (2019), can underplay the significance of these differences, leaving key governance issues underexamined. Internet and online-content governance proposals need to address directly the reality that “free speech” means different things to different people in different contexts.

Second, advocating specific normative stances means little if one does not possess the ability – the structural power – to implement them. In other words, the key political debate is not between what norms should be implemented, but who should be allowed to decide how society’s fundamental needs – in this case, related to speech and communication – should be fulfilled. *Who* is in control, and *how* governance happens – the essence of structural power – should therefore be a primary – even the primary – criteria on which internet governance proposals are assessed.

The existence of competing views on how societies should be run and the importance of structural power indicates that we should evaluate competing online-content regulatory frameworks by the quality of their decision-making processes. Moreover, the non-existence of an objectively superior content-regulation regime points us toward a democratic norm as the benchmark against which we can evaluate these proposals. Adopting democracy as our benchmark has the benefit of being globally recognized as a dominant, freedom-increasing (Braithwaite 2017) norm. Adopting democracy as our guiding norm also has the benefit of imposing upon us a measure of humility, forcing us to recognize that our own prejudices, biases and assumptions may not be shared by others, and that rather than seek to dominate others with our obviously correct positions, we should recognize the legitimacy of our differences, arrived at democratically.

2. The internet-governance impossibility trilemma

Focusing on governance norms – in this case, democratic accountability – as our evaluative benchmark brings us face-to-face with the dominant global-governance problem, what Princeton economist Dani Rodrik calls the “fundamental political trilemma of the world economy” – that “we cannot have hyperglobalization, democracy, and national self-determination all at once. We can have at most two out of three” (Rodrik 2010, 200). This outcome is a consequence of the fundamental character of a hyperglobalized political economy. A hyperglobalized world requires that “national borders do not interfere with the exchange of goods, services, or capital.” In such a world, restrictions on the movement of these economic assets are treated as inefficiencies to be

stamped out; it is the role of the nation-state to adjust its economic policies to ensure “that they pose the least amount of hindrance to international economic integration” (Rodrik 2010, 201).

This model fits well with the idealized version of global internet governance. In internet governance, a hyperglobalized world is one in which the same set of rules apply the same to all countries, often implemented by a global platform. Restrictions implemented by states on the flow of content and data is likewise treated as a threat to the global nature of the internet. Content and data must flow freely across borders to maintain a hyperglobal internet.

This state of affairs suffers from two main drawbacks. First, it does not adequately incorporate diversity into its regulatory framework. Different societies and countries have different norms when it comes to content regulation, ranging from the extremist free-speech position of American First Amendment activists (Franks 2019) to the authoritarian state censorship of dictatorships like China, with the European Union’s more privacy-focused ideal laying somewhere between these two. Second, it does not meet the democratic ideal: rule-setting in this context lacks accountability and representation.

There are two possible solutions to this impasse (assuming one is interested maintaining some form of democratic accountability): either preserve hyperglobalization by embracing some form of global democracy or give up on hyperglobalization (i.e., a world of global platforms) and embed internet/platform governance in domestic, democratically accountable regimes.

Of the two solutions, the latter is more realistic than the former. A truly democratic and sustainable hyperglobalized economic regime, notes Rodrik, requires “a ‘global body politic’ of some sort, with common norms, a transnational political community, and new mechanisms of accountability suited to the global arena” (2010, 203). While none of these three criteria are easy to fulfill, it is the “lack of clear accountability relationships” that represents the “Achilles’ heel of global governance” (Rodrik 2010, 212), since “the world is too diverse to be shoehorned into a single political community (Rodrik 2010, 228). In contrast to the clear lines of authority between the electorate and governors in a democracy, via the mechanism of elections, global legitimacy would have to come from another source. These, however, will continue to be stymied in the absence of a global political identity or community. More practically, we can see the problems emerging here when considering the possibility of global standards, which Rodrik posits as a possible solution to this global legitimacy problem. However, as Rodrik points out, “What is ‘safe’ for the United States may not be ‘safe enough’ for France or Germany. ... Nations have different views because they have different preferences and circumstances” (Rodrik 2010, 223). Rodrik here is talking about financial regulations, but he could just as easily be talking about restrictions on speech. To take two obvious examples, Holocaust denial will be perceived differently in different countries.

Information provision based on transparency and certification by non-state actors such as non-governmental organizations or some form of business-NGO structure, offers a market-based solution to the problem of legitimacy and accountability. This approach, however, poses its own problems. The accountability of certifiers, be they credit-rating agencies or multistakeholder content-moderation councils, would remain suspect, as private corporations and non-governmental organizations each has their own self-interested agendas (Rodrik 2010, 226; for a

similar analysis on multistakeholder governance within internet governance see Powers and Jablonski 2015; and Carr 2015). And that's assuming that individuals can actually make socially beneficial decisions in these areas. Transparency and consumer choice is of little use if consumers are not capable of evaluating their options (Obar and Oeldorf-Hirsch 2018), or if the service providers are monopolies.

At its extreme, the democracy-nation-state corner of the trilemma would respect the need for democratic accountability and the diversity of views on how platforms should be regulated, but potentially by creating an autarkic situation. This is not the only possible option, however. Rather than autarky – an extreme version of the trilemma's democracy-nation-state corner, one could embrace a global system that respects international diversity while respecting the limits this diversity places on cross-border governance regimes. Recognizing that countries' have different and legitimate approaches to content regulation – that is, acknowledging that “Countries have the right to protect their own social arrangements, regulations, and institutions,” and that “Countries do not have the right to impose their institutions on others” (in other words, don't be a regulatory superpower) – points a way forward for global economic and internet governance (Rodrik 2010, 240–42). It requires abandoning the quixotic (and essentially oppressive) search for a true universal system, replacing ambitions for a global regime with the search for international/global institutional arrangements that “lay down the traffic rules for managing the interface among national institutions” (Rodrik 2010, 243). Democracy, and democratic accountability, thus becomes the guiding principle for shaping global economic governance. The corollary to this point is that non-democratic countries should not be allowed “the same rights and privileges in the international ... order,” since their decision-making processes are by definition illegitimate (Rodrik 2010, 244).

3. From global economic governance to global internet governance

As for global economic governance, so, too for global internet governance. On issues such content regulation, societies are deeply divided “in terms of preferences, circumstances and capabilities” when it comes to content regulation. The temptation is to either impose a single set of values on a pluralistic world, or to worry about the breakdown of the global internet. Against this background, the internet-governance impossibility trilemma offers a straightforward set of criteria we can use to evaluate proposed online content regulation regimes without pre-judging what the regulations should be.

This evaluation begins with the understanding that (democratic) societies can have legitimately different views on what constitutes appropriate content regulation and legitimate censorship. This legitimacy should not be measured against a “free speech” ideal, since it is the boundaries of this concept that are actually being litigated, and there exist legitimate disagreements about where these lines should be drawn: there is no optimal form of content regulation. Instead, legitimacy in the making of these decisions is bound up primarily with democratic accountability.

This principle established, we must identify who, or what organizations make the rules governing content regulation – who decides, in other words. This aspect allows us to place the regime in its particular trilemma corner.

Having identified the relevant actors, we can then identify a proposal's sources of legitimacy and accountability – that is, the processes by which the rules are made. The remainder of this paper applies this framework to four leading content-regulation schemes.

B. Impossible governance: Four proposals

1. Undemocratic hyperglobalization: Facebook's "Independent Oversight Board"

Facebook's proposal to create a form of appeals board for specific content decisions is an example of an attempt to maintain hyperglobalization without democratic accountability. While some details remain to be unveiled as of this writing (early October 2019), the general contours of the "Independent Oversight Board" are clear enough to allow us to draw some conclusions. First, in terms of rule- and norm-setting, structural power will remain exclusively with Facebook. The Board – whose initial members will be either appointed solely or jointly by Facebook – will only be able to issue recommendations ("provide policy guidance" (Harris 2019b)). Second, its small size (40 people from around the world) means that it will only deal with a relatively infinitesimally small number of specific cases per year.

While many details regarding this Oversight Board have yet to be released, Facebook's approach here would maintain a single set of global regulations, with some variations at the domestic level. In terms of accountability, the Board represents an attempt to build legitimacy for its hyperglobalization via the selection of experts ("a diverse and qualified group of 40 board members" (Harris 2019b)): they must "have familiarity with matters relating to digital content and governance, including free expression, civic discourse, safety, privacy and technology" (Facebook 2019, Art. 1.2).

As such, this use of experts is an example of an attempt of legitimation via scientific standards. However, as Rodrik noted above, global standards fail to account for societies' "different preferences and circumstances" (Rodrik 2010, 223): it would be folly to expect 40 people to be able to take into account these differences, even more so since the initial Board will be effectively selected by Facebook itself. Most damningly, the societies over which these 40 individuals will have power will not have a say in who will be ruling over them. And of course, we would still have no recourse to remove Mark Zuckerberg, the person who rules Facebook, from his position of power.

2. Muddled hyperglobalization, or confused nation-state democracy: David Kaye's rule by international human-rights law

Much more interesting than Facebook's transparently naked attempt to pre-empt state regulation of its activities of the type described by Winseck and Puppis (2019) is David Kaye's proposal that governments and companies adopt international human rights law – specifically, Article 19 of the Universal Declaration on Human Rights, as their benchmark in regulating these companies and in companies setting their terms of service. At first glance, it seems to represent an attempt to build a global polity, centred around global human-rights norms, to legitimize a global system. However, Kaye, an American legal scholar and the UN Special Rapporteur on the Promotion and

Protection of the Right to Freedom of Opinion and Expression also seems to embrace the need for domestic control over social-media platforms:

Today, a few private companies, driven to expand shareholder value, control social media. And yet the rules of speech for public space, in theory, should be made by relevant political communities, not private companies that lack democratic accountability and oversight (Kaye 2019, Conclusion).

When viewed through the lens of Rodrik’s trilemma, Kaye’s proposal gets a bit messy. Governments themselves should take a minimalist regulatory role, except when they should be more engaged. They should avoid “heavy-handed content regulation” while working to “protect the space for individual expression, reinforce the need for transparency by the companies and themselves, and invest in the infrastructure necessary for freedom of expression in their countries” (Kaye 2019, Conclusion). However, they should also not delegate decisions about content to the companies without government oversight. Meanwhile, there should also be a role for public institutions, ensuring that “any efforts to take down content are channeled through independent courts or agencies, which themselves are subject to challenge and appeal” (Kaye 2019, Conclusion).

Overall, while Kaye argues that governments “already have the tools to pressure the companies to take action against content that, in their view, violates local law,”⁵ his government-focused recommendations run much closer toward the free-market ideal of government promoting transparency in service of enabling “user agency” (Kaye 2019, Conclusion).

Meanwhile, Kaye also recommends that local “civil society activists and users should have an explicit role in company policymaking” (Kaye 2019, Conclusion). They would be engaged by the platforms as multistakeholder councils “to help them evaluate the hardest kinds of content problems, to evaluate emerging issues, and to dissent to the highest levels of company leadership” (Kaye 2019, Conclusion). And in a presumably unintentional but telling turn of phrase that hints at the colonialist position of the global platforms, in which global rules are slightly tweaked for domestic subjects, Kaye also suggests that these American companies also have “desk officers” for each country, consisting of “ideally nationals from that country” (Kaye 2019, Conclusion).

In this view, it is the nationals’ job to represent themselves and their society to the foreign company/rulers. These desk officers would be able to make their concerns heard, but with power remaining firmly entrenched within the company itself. Both the multistakeholder council idea and the market-based solutionism of a transparency-driven approach reflect and are vulnerable to the same critiques levelled by Rodrik above: simply invoking “civil society” does nothing to eliminate accountability issues, while the pursuit of transparency assumes both a well-functioning, competitive market, that individuals are capable of making informed choices about very complex issues, and that some choices shouldn’t be on the market, as it were (e.g., choosing to use a product made of asbestos; choosing to let neo-Nazis spread their poison online).

⁵ Kaye may be overstating this power somewhat, particularly with respect to democracies. To take only one example, in the run-up to the recent Canadian federal election, Facebook said it would not remove false or misleading content (Boutilier 2019).

From a governance perspective, the fundamental issue is this: who is responsible for interpreting Article 19 and human-rights law generally? Kaye seems to leave it primarily up to the global platforms, assuming that it is enough for them to incorporate international human rights law into their terms of service, while avoiding the central question of interpretation of said law. His proposal would impose a weak accountability on these platforms, perhaps akin to the Facebook Oversight Board, while leaving effective rule-setting power in the hands of the global platforms. Meanwhile, the state would seem to have the role of adjudicating content takedowns but would otherwise be responsible for ensuring a competitive marketplace. This leaves indeterminate the question of who governs. Kaye seems reluctant to provide too much of a role for the state, which somewhat ironically leaves the global companies with the ability to interpret human rights law, presumably in their own interest.

Kaye's discomfort with the state as a regulator comes across clearly in his worry that a company's advisory multistakeholder councils could be captured "by ill-intentioned governments or groups" (Kaye 2019, Conclusion). From this perspective, "ill-intentioned" refers to a government's policy objectives, presumably against free speech. It presumes that legitimacy comes from whether a government has the "right" values, not whether the government itself was democratically elected. But who determines when a government is "ill-intentioned"? It is this question that brings us to the tension at the heart of Kaye's proposal. One's judgment of the ill-intentionedness of a government's policies will always depend on where you stand. The right to judge when a government or company or individual's actions are "ill-intentioned" is the central problem of content and platform regulation: who should it be? The internet-governance trilemma highlights starkly our two choices: either impose a global standard or work to accommodate local differences. It also highlights the need to focus on the ultimate decision-maker, which in our world is the platform or the state. Kaye's remarks about the importance of local civil society suggests an awareness of the need to respect local differences. However, by limiting state involvement in the regulation of platform's activities, his proposal fails to fully come to terms with what such respect would actually require, namely the empowerment of domestic governments to regulate global platforms as they see fit, according to their own (local) interpretations of international human rights law.

It is worth thinking through what Kaye's proposal would look like if it had taken democratic accountability as his fundamental norm, rather than Article 19. Such an approach would have allowed him, for example, to distinguish between democracies like Canada and dictatorships like China when it comes to legitimate content regulation. Such a distinction would possibly allowed for a more coherent account of how regulation should/would occur. "Ill-intentioned," in the democratic-norm approach, would be judged on whether proposals and policies had been arrived at through legitimately democratic means. Similarly, such a frame would force us to confront the question of the source of legitimacy of civil society, academics and users, here treated by Kaye as practically equivalent to democratic (and non-democratic) states, rather than actors that influence the state and companies in their role as citizens, experts and consumers. In short, starting from a focus on democracy and rule-making would force one to consider the question, who will make the rules?

3. Democracy and the nation-state: The United Kingdom's Online Harms White Paper

As of this writing (mid-October 2019), the United Kingdom’s Online Harms White Paper remains a proposal. As a draft of a proposed policy, rather than proposed legislation, it necessarily is somewhat vague, and any subsequent legislation could differ dramatically from the broad outline it suggests. Moving on from those caveats, this highly controversial document (e.g., Smith 2019; Soo 2019 citing US legal scholar Daphne Keller) represents a proposal to comprehensively regulate online content in the United Kingdom. It proposes the creation of an arm’s-length regulator (or tasking an existing regulator) to “implement, oversee and enforce” a “new regulatory framework” (“Online Harms White Paper” 2019, 9). It would set out “codes of practice” describing this duty of care. It would “have the power to require annual transparency reports from companies in scope, outlining the prevalence of harmful content on their platforms and what countermeasures they are taking to address these,” and could require additional information “including about the impact of algorithms in selecting content for users and to ensure that companies proactively report on both emerging and known harms” (“Online Harms White Paper” 2019, 7–8). It would also have enforcement powers. Moreover, it would “encourage and oversee the fulfilment of companies’ commitments to improve the ability of independent researchers to access their data, subject to appropriate safeguards” (“Online Harms White Paper” 2019, 41). With respect to illegal harms and “those harms which may be legal but harmful, depending on the context,” regulations would be “more specific and stringent” for the former than the latter (“Online Harms White Paper” 2019, 42). Such “harms” would not be criminalized, but platforms would be required to demonstrate that they are doing something to deal with them. The regulatory body would also undertake research to inform the regulatory process and “promote education and awareness-raising about online safety” (“Online Harms White Paper” 2019, 53).

The regulatory body, whether new or an existing body with amended powers, would have oversight over complaints processes, possibly with an independent review mechanism. While the regulator would not adjudicate disputes between individuals and companies, it would provide users with certain rights and “would also determine any ‘super complaints’ process and designate bodies” (“Online Harms White Paper” 2019, 46). The regulator would be responsible to Parliament, with the Parliament’s role in setting codes of conduct left as a matter for discussion and consultation (“Online Harms White Paper” 2019, 47).

In terms of Rodrik’s trilemma, the UK’s proposal would place much of the rule-setting authority regarding platforms’ terms of service and appeals process in the hands of the state (more precisely, with an arm’s length regulator). The legitimacy of this move is based in the democratic accountability of the Westminster system. This is a proposal put out for consultation by a democratically elected government that will (assuming it goes forward) eventually propose legislating enabling this regulatory framework, as well as either creating a new regulator or amending the authority of an existing regulator, each of which would require both legislation and would almost certainly be subject to some form of judicial oversight.

Much of the commentary about the White Paper have focused on two aspects, particularly as they might affect speech regulation (Smith 2019; Goodman 2019; Nash 2019)⁶:

⁶ For an academic analysis of the White Paper, see the *Journal of Media Law’s Symposium: Online Harms White Paper* (Rowbottom 2019). On duty of care particularly, see (Woods 2019; Tambini 2019).

- that a regulator (either an existing one or a new entity) be responsible for regulating both unambiguously illegal activity as well as online “harmful content or activity that may not cross the criminal threshold but can be particularly damaging to children or other vulnerable users”(“Online Harms White Paper” 2019, 6) (see Table 1); and
- that the government establish a new statutory duty of care to make companies take more responsibility for the safety of their users and tackle harm caused by content or activity on their services,” to be “overseen and enforced by an independent regulator” (“Online Harms White Paper” 2019, 7).

Table 1

List of online harms

- | | |
|----------------------------------|--|
| • Cyberbullying and trolling. | • Violent content |
| • Extremist content and activity | • Advocacy of self-harm |
| • Coercive behaviour | • Promotion of Female Genital Mutilation |
| • Intimidation | |
| • Disinformation | |

Source: Online Harms White Paper, p. 31

Critiques (see above) have focused on the potential for the regulation of “legal but harmful” practices to chill free speech, and on the appropriateness of a regulator setting rules for practices that are not explicitly illegal. Such comments raise an important qualifier with respect to the internet-governance trilemma, namely that democracy is not an absolute value: some practices may be more democratic than others.

That said, in a democracy not all rules require that they be passed directly by a legislative body to be considered legitimate. The delegation, via regulation, of rule-making to government agencies is a commonplace. Even tasking a regulator with the power to informally influence a company or sector is not necessarily an illegitimate or undemocratic practice. In Canada, central bankers wishing to influence the small number of large charter banks that dominate Canada’s banking sector has long relied on “moral suasion” to convince the banks to implement publicly beneficial (in the eyes of the central bank) policies without having to go through the legislative process (Breton and Wintrobe 1978). Even voluntary guidelines and codes of practice are commonplace within democratic countries like Canada on issues, such as access to finance, that are at least as important as speech regulation.⁷ Moreover, such practices may be particularly well-suited to situations to deal with situations that are socially problematic but may not fit within a black-and-white legal framework, or where the private sector has particular technical expertise to address an issue.

The banking sector offers another example of a quasi-independent agency that makes decisions largely isolated from ongoing political influence in the form of central banks, which control the setting of short-term interest rates and, generally speaking, the management of the monetary side of the economy. The idea behind central-bank independence is that interest rates and the ability to print money are so tempting that they should be left to technocrats to manage, rather than be

⁷ For example, the Financial Consumer Agency of Canada oversees the implementation of voluntary financial-sector codes of conduct. See <https://www.canada.ca/en/financial-consumer-agency/services/industry/laws-regulations/voluntary-codes-conduct.html> (accessed October 6, 2019).

subject to day-to-day political control. One sees a similar logic in the White Paper: “legal but harmful” content is a problem, but it is exacerbated by the possibility that politicians, reacting to constituents’ desires, may over- or under-shoot desirable policy objectives, in a particular direction. This point is particularly important given the fact that what looks like sound regulation to one person may appear to another as reckless policy. For example, in much of the platform-regulation debate, the US First Amendment is seen as the gold standard against which all policies must be judged, a view not necessarily shared by many non-Americans, and even some Americans (e.g., Franks 2019), who worry that its overzealous interpretation itself is a cause of social instability. Leaving margin calls to an independent regulator that remains generally accountable to the government of the day could be seen as a recognition of this delicate situation, in which accountability is needed, but where there may be some wisdom in isolating the regulator from direct political pressure.

Whether the eventual regulatory regime would end up being sufficiently democratic would be a matter for debate. Of key importance, for example, will be the process by which codes of conduct are created and (even more importantly) amended. Regulators and politicians, like all of us, make mistakes, with the status of a policy as a “mistake” often being in the eye of the beholder. What matters most here is whether and how policies can be changed and/or appealed. However, in its current (notional) form, the White Paper’s is situated within a normal framework of democratic accountability. To their credit, the White Paper does not shy away from recognizing that someone, at the end of the day, must exert structural power over these platforms. Faced with a choice between unaccountable platforms and a democratic (if flawed) state, it chose the democratic state.

4. Multilateral, democratic, but not hyper-global: Macron’s proposal

While the United Kingdom’s proposal may clearly embrace democratic accountability, it does so within the nation-state. Being a single country’s proposal, it necessarily has little to say directly about global internet governance. If its regulatory approach (rather than the norms underlying it) were exported, it would lead to a world of discrete content-regulation jurisdictions. While this outcome would bring the global platform behemoths to heel, it would likely be less positive in terms of encouraging cross-border communication.

This problem, as Rodrik highlights, has an economic analogue in the immediate post-World War II period. The capitalist-democratic countries wanted the advantages that came from cross-border economic exchange, while realizing that cross-border economic flows (capital and goods) can sometimes destabilize an economy and society. In short, they wanted to retain the ability to implement domestic rules in their nation-state, reflecting their specific circumstances while avoiding the perils of hyperglobalization.

The solution, embodied in the Bretton Woods institutions, was what political scientist John Ruggie calls “embedded liberalism”: “unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism” (Ruggie 1982, 393; see also Rodrik 2010).

In short, when faced with destabilizing international-economic forces, countries could adjust their policies to resist these pressures, rather than change their policies to accommodate these pressures. Over the past four decades, the global economic *modus operandi* has been reversed, with countries expected to adjust their policies to fit the needs of the global economy, be it with respect to wages, interest rates or fiscal policy: hyperglobalization minus democratic accountability.

One of the reasons why Macron's speech was perceived as controversial⁸ in internet-governance circles was because it explicitly took as its starting point the notion that democratic accountability and the preservation of democracy, rather than free speech and net neutrality, should drive the internet-governance discussion:

We cannot simply say: we are the defenders of absolute freedom everywhere, because the content is necessarily good and the services recognized by all. That is no longer true. ... Our governments, our populations will not tolerate much longer the torrents of hate coming over the Internet from authors protected by anonymity which is now proving problematic.

Importantly, Macron, unlike Kaye, distinguishes between democratic and authoritarian societies, arguing that this distinction should be the basis for state regulation:

Not all governments are equal: there are democratic governments and undemocratic governments; some governments are driven by liberal democracy, while there are also illiberal democracies; and lastly, there are non-democracies. In relations with governments, we cannot accept a certain lack of differentiation.

This assertion echoes Rodrik's proposal regarding global economic governance. It holds that democratic accountability is (should be) the source of legitimacy in global economic governance. In the presence of a pluralist international society and the absence of a global polity, this accountability is lodged firmly within the nation-state. Importantly, in contrast to Kaye but in agreement with Rodrik, Macron argues that this lack of democratic legitimacy justifies a differential approach to authoritarian countries, which should play "by different, less permissive rules ... particularly when they have costly ramifications ... in other countries" (Rodrik 2010, 245).

Macron's speech, from a global-democracy perspective, helpfully moves beyond both Kaye's framework, which attempts a global normative approach that fails to fully taken on board the implication of the existence of local preferences, and the UK White paper, which is largely silent on how it sees the UK fitting into the society of democratic states. It clearly addresses the question of who should be make the rules governing the internet – democratic nation-states – and grounds this accountability in the global norm of democratic accountability. However, it also acknowledges the benefits from cross-border communication flows. In doing so, it offers us a way forward that avoids both Facebook-style unaccountable hyperglobalization and potentially autarkic state-centric internet policy. This paper takes up this possibility in the conclusion.

⁸ This assertion is based on personal observation, the author having been present when the speech was delivered.

C. Conclusion: Rediscovering embedded liberalism

One of the key questions facing those interested in questions of global internet governance is: what should “global” mean? One of the key insights that emerges from a consideration of global economic policy is that “global” need not necessarily mean “uniform rules.” The objective of a global internet or platform policy need not require uniformity. Moving forward on the content-governance issue requires reframing the question, in a way that is old hat for trade and financial economists. Rodrik puts it this way:

Instead of asking, ‘What kind of multilateral regime would maximize the flow of goods and capital around the world?’ we would ask ‘What kind of multilateral regime would best enable nations around the world to pursue their own values and developmental objectives and prosper within their own social arrangements?’ (Rodrik 2010, 244).

A perspective that recognizes the legitimacy of local differences and the fundamental norm of democratic accountability requires a global framework whose primary function is to ensure the interoperability of different regimes. In other words, it requires a rediscovery of the virtues of embedded liberalism. Such an approach recognizes democratic norms as the legitimizers of content-governance policies, while respecting the ability for (democratic) nation-states to set their own policies in accordance with their own values and needs. It involves an emphasis on making distinctive systems interoperable, rather than embracing a hyperglobalized monoculture.

This type of world is quite different from the one in which we currently live. In the current hyperglobalized world, global platforms are the dominant norm- and rule-setters (Klonick 2017), making adjustments when absolutely necessary for different domestic audiences, and often only when confronted with a significant political or economic challenge. Even when it comes to reforms, small (democratic) countries are largely ignored in global internet-governance debates, which are framed as titanic great-power struggles between the United States and China. The European Union, meanwhile, fancies itself as a “regulatory superpower” (e.g., Leonard 2016), which amounts to an assertion of neo-colonial domination, an attempt to unilaterally set global standards, with no say given to smaller countries. This current great-power posturing respects neither democratic norms nor legitimate domestic differences, even as the European Union and the United States both attempt to claim to speak for free speech and the global internet.

Macron’s speech, in contrast, emphasizes respect for local differences while also encouraging cross-border cooperation when possible. Such a system would work “as a collection of diverse nations whose interactions are regulated by a thin layer of simple, transparent, and common-sense traffic rules,” as Rodrik put it in a slightly different context (2010, 280). Such an approach necessarily reframes the primary policy issue of ensuring that free-speech protections are enjoyed worldwide to ensuring respect for domestic preferences, democratically arrived at, and managing adverse cross-border effects.

Focusing on democratic accountability as the key norm can also allow for a productive engagement on these issues at the domestic level. As Braithwaite (2017) notes, the existence of a

democracy and democratic processes is not sufficient, as democracies can themselves enable domination. A full account and analysis of internet-governance proposals must look beyond Rodrik's state-level approach to the question of democracy and legitimacy to judge the democratic bona fides domestic processes and proposals, such as those outlined by the UK White Paper. These could be assessed based on the extent to which they ensure that neither states nor private companies, or even dominant civil-society actors, use the processes in place to illegitimately dominate others. Such an approach may allow us to consider issues such as the regulation of "legal but harmful" harms mentioned in the UK White Paper in a different light. Given that such harms – legal but damaging – likely disproportionately affect marginalized groups and individuals, we would do well to consider the extent to which addressing them may increase freedom and nondomination for these groups and individuals in line with the democratic ideal, rather than starting from a pure free-speech focus.

This democratic-accountability focus, combined with the diversity of legitimate views on content regulation, complicates the question of what should be done with the global (American) platforms that dominate the non-Chinese and non-Russian world. When a company like Facebook (accountable to only one person, Mark Zuckerberg), sets communication policy for over two billion people it is effectively dominating these people, and their societies. In other words, it is restricting their freedom to live their lives under rules – however wise or foolish – that they have chosen for themselves.

It suggests the question of whether democratic norms and domestic sovereignty (in the most basic sense of people being able to shape the rules under which they live) are compatible with the existence of these companies. In the US Democratic primary, talk of breaking up the large platforms is all the rage. It may be time to ask whether these companies should be broken up, not just along product lines, but globally as well, with – for example – Facebook Canada being an independent entity from Facebook Europe, subject to local laws and supervision.

As Susan Strange reminds us, the ability to shape the underlying rules and norms is central to the exercise of power. Refocusing the debate over the legitimacy of platform regulation proposals to examine their democratic bona fides, both within and between countries, offers a useful way to engage with these issues. Macron's speech, in emphasizing the existence of difference and the importance of democratic accountability within a like-minded community of democratic states, suggests a promising way to deal with the internet-governance trilemma.

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