Regulation and Emancipation in Platform Law : the Moderation of Palestinian Voices Online

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Abstract

Social media have evolved from a relatively unregulated spaces, to a regulated spaces and a regulating space. In times of crisis, when law often fails to guarantee rights essential to the free expression and the self-determination of people, and potential for emancipation seems to fade, they also represent a space of self-expression and self-regulation, maybe the hope of reinventing a better legal order. Using critical legal theory, this thesis asks whether platform law can qualify as a legal system and if as such, it carries a potential for emancipation, in an empirical analysis based on the case of Palestinian voices on Meta's social platforms.

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INTRODUCTION

Resist, my people, resist them.

Resist the settler's robbery

And follow the caravan of martyrs.

Shred the disgraceful constitution

Which imposed degradation and humiliation

And deterred us from restoring justice.[1]

These words gained the poet Dareen Tatour almost three years of house arrest without access to the Internet, and a sentence of five months of imprisonment in 2018.[2] Today, words like 'resistance' and 'martyr' may be flagged by Meta itself as incitation to violence before reaching real-life prosecution.[3] What are the link between state and non-state moderation of speech? If modern state law and international law have helped sustain hegemony, is the free internet offering any alternative?

Since the first Naqba in 1948 until the recent break-through recognition of *apartheid* and right to resistance by Special Rapporteur Francesca Albanese,[4] Palestinian representatives at the international level and the Palestinian civil society have been using different means to resist occupation, discrimination and human rights violations – social media and law are two of them.

Reliance on the law is characteristic of situations of power imbalances, as a tool of internal and external legitimization.[5] Safeguarding freedom of expression and digital rights is essential to preserving values of rule of law in the international community and the self-determination of the Palestinian people. With the development of the online space, social media has become a central space of expression. Platforms such as Facebook and Instagram, as global communities of which anybody can be a citizen, have been playing a central role for the free expression and the social and political organization of Palestinians, a people without a state.[6] They have been using online social platforms to share their lived reality, amongst others Meta's social media

[1] Dareen Tatour, *Resist, My People, Resist Them*, translated to English by Tariq al Haydar, available at https://arablit.org/2016/04/27/the-poem-for-which-dareen-tatours-under-house-arrest-resist-my-people-resist-them/.
[2] *Dareen Tatour Sentenced To Five Months In Prison Over Poem*, AL JAZEERA (Jul. 31, 2018), https://www.aljazeera.com/news/2018/7/31/dareen-tatour-sentenced-to-five-months-in-prison-over-poem.
[3] *Israeli and Palestinian leaders tell Nick Clegg to stop plague of misinformation*, THE TELEGRAPH (May 23, 2021), https://www.telegraph.co.uk/news/2021/05/23/israeli-palestinian-leaders-tell-nick-clegg-stop-plague-misinformation/; *Facebook accused of censoring Palestinians under pretext of fighting hate speech*, MIDDLE EAST EYE, https://www.middleeasteye.net/news/facebook-palestine-censorship-anti-semitism-guidelines.
[4] Francesca Albanese (Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967), Report to the General Assembly, U.N. Doc. A/77/356 (Sep. 21, 2022).
[5] George E. Bisharat, *Land, Law, And Legitimacy In Israel And The Occupied Territories*, 43 AM. U. L. REV. 467 (1994) 469-71.
[6] *See, e.g.*, 7amleh – The Arab Center for Social Media Advancement, *Facebook and Palestinians: Biased or Neutral Content Moderation Policies* (2018), https://7amleh.org/wp-content/uploads/2018/10/booklet-final2-1.pdf, 6.

Facebook and Instagram,[7] and have been faced with a censorship that has prompted Meta to commission a human rights report on this particular issue.[8]

From these constatations stemmed a genuine question: if traditionally defined law[9] has failed to safeguard self-determination and enable emancipation so blatantly, can non-state law be (more) emancipatory?[10] In an effort to reduce the scope of the research, I use the Palestinian question as the epitome of the tension between regulation and emancipation, and social media as the place *par excellence* of free expression, hence the question becomes: Is platform law emancipatory for Palestinian voices?

My hypothesis and what prompted this research is that the norms regulating online speech on Meta's platforms can be assimilated to a legal system (Chapter 2), and that as such, they reproduce existing power structures present in state law (Chapter 3). They offer however a temporary potential of emancipation, if one accepts a strong and subject-centered form of legal pluralism (Chapter 4). The Palestinian case illustrates well the interplay and the binary nature of social media, which restrict Palestinian rights but also offer them a platform to re-claim an instigative role in the creation of legal norms.

I use a critical and sociological approach to legal theory and also draw on theories of international law, including TWAIL, when relevant. My analytical work is coupled with an empirical approach in identifying what law effectively is generated by the actors of the social media space in relation to a defined subaltern group. As we are uncovering the emerging legal systems and their interaction with tradition law using existing legal theory, my understanding of law as pluralistic in an effort to situate the answer to an analytical question at the limit between "is" and "ought" perspectives.[11]

The research question calls for several sub-questions that organize the chapters in the thesis. After a short Chapter 1 giving more context to the Palestinian situation and its relation with the rule of law, Chapter 2 will address the first two sub-questions, namely does non-state law exist, and if so, do Meta's social media qualify as a legal system? Chapter 3 will examine Meta's relation with traditional state law and international law in relation with freedom of expression and whether it reproduces its hegemony. Chapter 4 will examine the emancipatory potential of platform law. I will use examples of Palestinian online speech throughout, to ground these theoretical questions.

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[7] "Meta" will be used for the corporation Meta Platforms, Inc. and its subsidiary Meta Platforms Ireland Ltd, even when I refer to times when it was still called Facebook, Inc. (until 2021). Facebook and Instagram designate the respective social media platforms owned by Meta. Technically, Facebook and Instagram are both social networks and social media, these words are used interchangeably in this thesis.

[8] BSR, *Human Rights Due Diligence of Meta's Impacts in Israel and Palestine in May 2021: Insights and Recommendations* (September 2022), available at https://www.bsr.org/en/reports/meta-human-rights-israel-palestine.

[9] I use the terms "traditionally defined law" to refer both to state law and international law in an opposition to non-state law, and note that this is an imperfect shortcut as it refers to Western modern tradition.

[10] The question : "can law be emancipatory?" is the subject of BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (3rd ed. 2020). While I had this question before reading his work, I owe him a lot in the realization of the evolution of the tension between regulation and emancipation over time, which confirms my endeavours with this question. His work has inspired much of my theoretical approach.

[11] Margaret Davies, *Pluralism and Legal Philosophy*, 57 N. IR. LEGAL Q. 577 (2006), 596.

These questions warrant some clarification when it comes to the terms used and the assumptions I explicitly or implicitly make. I chose the words of M. David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, "platform law" to designate the non-sate law created by Meta, an "enigmatic regulators, establishing a kind of 'platform law' in which clarity, consistency, accountability and remedy are elusive."[12] This definition seems appropriate and avoids the confusion with "social media law" commonly used to designate state law and international law regulating social media.

I use the term "voice" intendedly, both because it is one of Meta's core principles, and to remind the reader that the scope of the thesis does not allow for an examination of Meta's law in relation to other digital rights. I'm leaving aside issues such as that of privacy rights, or other issues related to freedom of expression like the spread of misinformation.

There's an indisputable Western bias in the question. First, values such as the rule of law and freedom of speech have by no means a universal understanding. Second, the understanding of what is or is not law is rooted in Western legal theories that have developed with and in reaction to European Enlightenment and the modern State. The reasons for embarking in this research despite these biases are two-folds: first, I will argue that there is some benefit in using the master's tools to dismantle the master's house, at least when they are the only tools available and if limited in time to a transitional period. Second, while I do depart from a Western understanding of law and concede that all effort of theorization carry a certain claim to universalization, I am concerned with a specific group and their practice, and aim to integrate their conception to my analysis. De Sousa Santos also reminds us, it the neoliberal globalization has imposed a paradigm that definitely has exclusively Western roots but likely applies to a more global scope – hence there is merit in examining the tension between emancipation and regulation at a global scope too.[13]

Finally, while there is, I hope, some merit in a discussion about the interplay between law and emancipation, I must recall here the very limited scope of this thesis, both in terms of what it brings to the scholarship on the subject and in terms of the relevance and adequacy of the subject for an effective end to Palestinian lived reality of domination, discrimination and most horrendous human rights violations.[14]

1. CONTEXT: PALESTINE AND THE RULE OF LAW

I have already flagged the embedment of the research in Western values, among which the rule of law, a Western concept born within the European elite and rooted in its privilege, used both to maintain domination and to extend it, and relatively unquestioned.[15] Israel also earned its

[12] David Kaye (Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression), Report to the Human Rights Council, U.N. Doc. A/HRC/38/35, (Apr. 6, 2018), 3. This designation is also used by Molly K. Land, *The Problem of Platform Law: Pluralistic Legal Ordering on Social Media*, *in* THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 974 (Paul Schiff Berman ed., 2020).
[13] DE SOUSA SANTOS, *supra* note 10, at 529.
[14] As I write this and before the first month of the year ends, thirty Palestinian civilians were killed in 2023, *cf.* https://www.middleeasteye.net/news/israel-raid-jenin-killed-wound-several-others.
[15] *See, e.g.*, Roderick A. Macdonald & David Sandomierski, *Against Nomopolies*, 57 N. IR. LEGAL Q. 610 (2006), 611. On the use of rule of law in colonial contexts and the concept of legal orientalism, *see* UGO MATTEI & LAURA NADER, PLUNDER, WHEN THE RULE OF LAW IS ILLEGAL (2008), 15-17, and *see generally* EDWARD W. SAID, ORIENTALISM (1978), for a comprehensive account of the production of ideological justifications in the colonial domination of the subaltern.

membership of the Western states club on claims of being a democratic state based on the rule of law; it is, as a matter of historical fact, symptomatic of a colonial state in situations of power imbalance to rely on legalistic arguments to justify and further their domination.[16]

Noting these critiques, and avoiding to associate any moral value to the concept – it is neither good nor evil – it is also noted that it is a negative concept that opposes law, for the origin of evil is the law itself.[17] For Joseph Raz, the value of the rule of law resides not solely on its opposition to arbitrariness, - it can only curb some forms of arbitrariness – but also in allowing for individual planning and safeguarding human dignity.[18] It does not mean that the rule of law is necessarily used only for the social good, but that it can be used as counterforce to law in minimizing the dangers facing human dignity and freedom.[19] Hence, as long as law is an important normative system that plays an important part in today's governance, the rule of law may represent a requirement to enable law to perform its 'good' social functions.[20] As one of the values that law must possess, and being multi-valued itself, conformity to the rule is measured in degrees and it also has to be contrasted and balanced with other values.[21]

Human rights suffer the same critiques of being both based on a Western conception and used to further colonial and Western imperialism.[22] There is plenty of literature on the subject, suffices to say here that, like the rule of law and despite their origin and misuse, freedom of expression plays a central part in Palestinian legal resistance. Human rights constitute hence another set of values that are desirable for the law to conform to, as imperfect and non-universal they may be.

There is a certain paradox in using rule of law and human rights in a context marked by domination and subalternity.[23] But it is a reflect of the paradoxical duality of international law that shapes the relations between Western states and their privilege to shape international law, and the Others, that are bound by it.[24] In the Palestinian situation, illustrated by the concept of international legal subalternity that conveys the double-standards of international law as applied by the international community, namely the promises of justice based on an international legal

[16] Bisharat, *supra* note 5, at 471-73. It is now widely documented and internationally recognized that Israel's version of rule of law , *cf. e.g.* Albanese, *supra* note 4.
[17] MATTEI & NADER, *supra* note 15, at 15; JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979), 219.
[18] RAZ, *supra* note 17, at 220-223.
[19] *Id.*, at 244.
[20] *Id.*, at 224-226. *See also* B.S. Chimni, *Legitimating the international rule of law*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 290 (James Crawford & Martti Koskenniemi ed., 2015), 290.
[21] RAZ, *supra* note 17, at 222, 228.
[22] *See* Antony Anghie, *On Critique and the Other, in* INTERNATIONAL LAW AND ITS OTHER 389 (Anne Orford ed., 2009), 396.
[23] Antonio Gramsci's concept of subalternity, the opposition between subalterns groups, economically oppressed and culturally dominated and the hegemonic power, has informed postcolonial studies and subaltern studies. *Cf.* Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337 (1996), 338 n.2. *See also* RANAJIT GUHA AND GAYATRI CHAKRAVORTY SPIVAK, SELECTED SUBALTERN STUDIES (1988); SAID, *supra* note 11; Ardi Imseis, The United Nations and the Question of Palestine: A Study in International Legal Subalternity (2009) (Ph.D. dissertation, University of Cambridge), https://doi.org/10.17863/CAM.37976.
[24] TWAIL scholars have written in length about this, *see e.g.* Antony Anghie, *On Critique and the Other, in* INTERNATIONAL LAW AND ITS OTHER 389 (Anne Orford ed., 2009).

framework which, even if relied on by the subaltern, is abused or simply overlooked by the community of dominant states.[25]

For Palestinians, rule of law has played a central role as a mean of legal resistance and has proved a powerful tool in resisting this subalternity at the international level, as ironic as it was at the level of their lived experience under occupation by a State that earned its statehood and membership of the Western states clan on claims that it is based on the rule of law while it maintains its monopoly.[26] There is thus a necessary reliance on these double-edged standards to have a say in the conversation, and they may contain in themselves a potential for resistance and emancipation of subaltern groups.

2. META PLATFORMS AS A LEGAL SYSTEM

2.1. A Plurality of Legal Systems

Since the international community has been failing Palestinian rights, having a look at non-state law as an alternative, fairer and more enabling legal system is a sound path to explore for a people whose state is far from being universally recognized. Before submitting Meta's system of regulating speech to some scrutiny to verify whether it deserves the quality of "law", I must first question what non-state law is and whether it is at all a useful analytical concept in legal theory.

To avoid a circular reflection, let's state the obvious: if we want to call any normative system that does not find its authority exclusively in the fact that it is state-made "law", we need to adopt a somewhat broader concept of law, and there are as many conceptualizations as there are legal theorists – the question is whether the definition is useful, and this depends on the context in which we operate.[27] Since our discussion revolves around the incorporation of subaltern conceptions and the emancipatory potential of law, a useful definition in my sense is one that somehow can be received within a Western understanding of law[28] without being rejected as too naïve while still serving the purpose of critically exploring the limits of our conception of law.

There was law before the state; whether there will be law after the state will be a question for a time when the collapse of the Westphalian state seems more likely. This is not our time. Our time is marked by the connection between law and state, which finds its historical roots in the birth of the modern Westphalian state and the colonial elimination of customs and traditional law and the shift from *ubi societas, ibi ius* to "where there is state, there is law".[29] At the same time, colonial powers were forced to recognize the existence of legal orders other than state law and it is in this context that the idea of legal pluralism came to be, to explain asymmetrical

[25] Imseis, *supra* note 23. On the international law exceptionalism applying to Palestine, *see generally* NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE (2019).
[26] *See, e.g.*, LYNN WELCHMANN, AL HAQ: A GLOBAL HISTORY OF THE FIRST PALESTINIAN HUMAN RIGHTS ORGANIZATION (2021) 1-27; Bisharat, *supra* note 5.
[27] Ralf Michaels & Nils Jansen, *Private Law beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006), 870; Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002), 40-42.
[28] While I don't necessarily agree with this conception, my point of view is that of a Western legal student and my analysis must recognize that the most authoritative definition of law is internally conceived, by legal scholars and practitioners. See Margaret Davies, *Pluralism and Legal Philosophy*, 57 N. IR. LEGAL Q. 577 (2006), 595.
[29] Keebet von Benda-Beckmann & Bertram Turner, *Legal Pluralism, Social Theory, And The State*, 50 J. LEGAL PLURALISM & UNOFFICIAL L. 255 (2018), 256.

power and race relations.[30] In Palestine, for example, the Western modern understanding of law was used to delegitimize existing indigenous land and property laws, while the existence of multiple legal systems and the absence of recognized land titles was instrumental in land dispossession.[31]

There are many theories of legal pluralism[32] that I have neither the expertise nor the space here to dwell on, but I will restitute some of the theory relating to what is understood here as strong legal pluralism, that is a pluralism that challenges an understanding of law as exclusively state law.[33] Legal pluralism literature is characterized by an overall concern to adopt a conception of law that is neither overinclusive nor underinclusive.[34] This stems from the combination of need to recognize that non-state law phenomena deserve our attention but to resist a normative tendency that would render the concept of law void.[35] I would tend to agree with Twining that, while concepts are important to define our subject of study, the necessary acknowledgement of the issues faced when one tried to conceptualize what law is needs not necessarily stop our analysis, and will allow us to continue and bring in other aspects which are arguably as important.[36] Von Brenda Beckmann rightly points out that law, as a heuristic device, doesn't exist in the outer world without the intervention of the human brain, hence in our sense a theory of law is necessarily a theoretical map of possibilities, which may or not be empirically confirmed.[37]

Switching to an empirical approach allows us to think of an inter-perspectival, critical legal pluralism: a theory of plurality of legal systems that draws from a plurality of perspectives and acknowledges the close relationship of the legal order with the social system.[38] This approach is also subject-centered and subject-driven, drawing on Tamanaha's non-essentialist vision that what is called law depends on the conception of the subjects in a defined social setting.[39] A broad conception of law takes into account the multiplicity of normativities in the organization of social relations beyond Western societies, and law in relation with the non-territorial globalized space, needs to be globally conceptualized, not as a claim for universality but to encompass social realities of different geographical and cultural communities.[40]

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[30] *Id.;* von Benda-Beckmann, *supra* note 27, at 60.
[31] Bisharat, *supra* note 5, at 552.
[32] For other takes on legal pluralism, such as a weak form of pluralism, *see, e.g.*, Davies *supra* note 11, at 577, n.3. Davies approaches legal pluralism a new understanding of state law.
[33] *See* Brian Z. Tamanaha, *An Non-Essentialist Version of Legal Pluralism,* 27 JOURNAL OF LAW AND SOCIETY 296 (2000), 318. Tamanaha however does not advocate for a separation between weak and strong pluralism. I see Tamanaha's approach to legal pluralism as weak, in the sense that it still relies on defined categories, and advocate for a stronger form of pluralism.
[34] *Id.*, 315; William Twining, *Normative and Legal Pluralism: a Global Perspective*, 20 DUKE J. COMP. & INT'L L 473 (2010), at 512; DE SOUSA SANTOS *supra* note 10, at 111.
[35] *See, e.g.*, DE SOUSA SANTOS *supra* note 10, at 111. He explains well the danger of the trivialization: "if law is everywhere, it is nowhere".
[36] Twining, *supra* note 34, at 498.
[37] von Benda-Beckmann, *supra* note 27, at 44.
[38] Emmanuel Melissaris, *Perspective, Critique, and Pluralism in Legal Theory*, 57 N. IR. LEGAL Q. 597 (2006), 607. *See also* Twining, *supra* note 34, for a definition of social fact pluralism.
[39] Tamanaha, *supra* note 33, 315. See also Melissaris. *supra* note 38, at 605.
[40] Twining, *supra* note 34, at 505, 512. *See, contra,* Margaret Davies, *Pluralism and Legal Philosophy*, 57 N. IR. LEGAL Q. 577 (2006). She argues that legal theory is mostly concerned with what is law within Western liberal democracies. This is true in the sense that the author is of Western liberal legal education and this thesis draws on a mainly Western scholarship. However, the meaning of law is necessarily broader in the context of social platforms as a global space.

We've warned and been warned about the danger of a conception of law that is too broad, and of the fallacies of over-conceptualization. Let us now address a last pitfall of legal pluralism, that of associating with it any kind of moral value. I adopt here De Sousa Santos' conception of a plurality of legal orders to distance himself from other "romantic and simplistic views of legal pluralism that would see it as necessarily progressive and would deny the centrality of state law."[41] Melissaris offers a similar rejection of the term legal pluralism and contends that all legal theory ought to be pluralistic and intersectional, which I can only agree with.[42] My idea of a critical legal pluralism accepts the idea of *ubi societas, ibi regula*[43]: communities create norms, which can evolve into legal system – most often, they do. Hence state is central, but not unique.

Now that we have determined our standpoint, we can turn to what deserves to be called law through the lens of critical legal pluralism. As a type of social norm among the wider realm of norms[44], law has these characteristics that elevate it above other social norms. What are they? For a lack of universally agreed set of characteristics between what is law and what is not, most analysis run the danger of confounding an analysis on a conceptual level with intrinsic characteristics of the law, criteria relating to the law itself, and questions of validity and legitimacy, that relate both to the maker and the recipient of the law.[45] Instead of entering into these debates, we will touch on legitimacy of Meta's law in the next section, and we agree to see law as a spectrum, and between what is clearly not law and what clearly is, clarity varies in degrees.[46]

2.2. Lex Meta

2.2.1. From lex electronica to lex Meta

Already in 2006, Lessig had described the shift of Internet as an unregulated space to a regulated space.[47] In Internet years, 2006 is centuries ago, and we posit here that from a regulated space, Internet – and in particular social media – have become a regulating space. Since their beginnings, multi- and interdisciplinary scholarship has been interested in the nature of such networks and their normative implications.[48]

The governance of social media rests on a combination of competing and intertwined norms system that can be presented as follows: social norms, law, contract, architecture (code) and the market.[49] I subscribe to the approach taken by Schulz & Dankert that market only governs user behaviour indirectly, through the provider (here Meta) and is thus situated on another

[41] DE SOUSA SANTOS, *supra* note 10, at 111. *See also* William Twining, *Normative and Legal Pluralism: a Global Perspective*, 20 DUKE J. COMP. & INT'L L 473 (2010), 502.
[42] Melissaris, *supra* note 38, at 609.
[43] Thomas Schultz, *Private Legal Systems: What Cyberspace Might Teach Legal Theorists*, 10 YALE J. L. & TECH. 151 (2007) 167.
[44] Twining William, *Normative and Legal Pluralism: a Global Perspective*, 20 DUKE J. COMP. & INT'L L 473 (2010), 480.
[45] Michaels & Jansen, *supra* note 27, at 870.
[46] Schultz, *supra* note 43, at 173.
[47] LAWRENCE LESSIG, CODE: VERSION 2.0 (2nd ed. 2006), Preface ix.
[48] *See eg.* MATTHIAS C. KETTEMANN, THE NORMATIVE ORDER OF THE INTERNET: A THEORY OF RULE AND REGULATION ONLINE (2020).
[49] Lessig, *supra* note 47, uses market and doesn't use contract. Wolfgang Schulz & Kevin Dankert, *'Governance by Things' as a challenge to regulation by law*, 5(2) INTERNET POLICY REVIEW (2016), 5, replace market by contract.

ontological level.[50] Market, in my analysis, is a driving force behind Meta's legislation and procedural law, but is not as such an element to analyze when it comes to determining whether Meta's platform law is a legal system, rather it will come into play in the substantive analysis of Meta's law in the regulation of its users' speech in Chapter 3. As for social norms, we have already established that there is a strong connection and interdependence between legal and social norms. While they play a role in determining users' behaviour, they are more relevant to our inquiry in subject-generated law, in Chapter 4. That leaves us with contract, law and architecture (code).

Land has undertaken a useful categorization effort that I will use here between a platform's contract law, substantive law, procedural law and technical law.[51] We have already talked about technical law, which refers to refers to code as architecture and constitution. These are the design rules that only the Platform knows, that guide what type of content can be shared according to technical standards and limitations particular to the platform. It also includes algorithms and their role in prioritization of content, demotion and are determined by user engagement.[52]

Meta's contractual relations with its users on Facebook and Instagram is a combination of different instruments, which I wonder if any casual user has awareness of.[53] Facebook's Terms of Service (*hereinafter* Facebook ToS)[54], respectively Instagram's Terms and Imprint[55] are juridically contracts – though a very imbalanced, "take it or leave it" one, with no negotiating power on the user's side, who have the choice between accepting the contract and not being a part of the platform community.[56]

When considering platform law as a legal system, however, we're not concerned with the corporation's capacity to conclude contract with its clients, those are normal private legal relationships. However, with more than two billion users,[57] Meta's community has more citizens than the most populated nation of our planet, and this contract resembles dangerously a constitution[58] – a social contract. Of course, the analogy is a bit of a shortcut, and the ToS

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[50] Schulz & Dankert, *supra* note 49, 5 n.2; Markus Oerman et al., *Approaching Social Media Governance*, HIIG Discussion Paper Series Nr. 2014-05 (2014), 9.
[51] Molly K. Land, *supra* note 12, at 981.
[52] *Id.*, at 986.
[53] Meta's Platform Terms, available at https://developers.facebook.com/terms (accessed 30 January 2023), refer to Facebook Terms of Service, available at https://www.facebook.com/legal/terms/update?ref=old_policy (accessed 30 January 2023), and Instagram Terms and Imprint, available at https://help.instagram.com/581066165581870/?helpref=uf_share (accessed 30 January 2023). These, in turn, refer to, respectively, Community Standards, available at https://transparency.fb.com/policies/community-standards/ (accessed 30 January 2023), and Community Guidelines, available at https://help.instagram.com/477434105621119. These are made of a labyrinth of hyperlinks full of cross-references that the users have to navigate through to get a full picture of the terms they're actually subject to.
[54] *hereinafter* Facebook ToS, *supra* note 57.
[55] *hereinafter* Instagram ToS, *supra* note 57. I abbreviate them as "ToS", assuming "ToI" is not self-evident to the reader.
[56] Alice Witt et al., *The Rule Of Law On Instagram: An Evaluation Of The Moderation Of Images Depicting Women's Bodies*, 42 UNSW LAW JOURNAL 557 (2019) 565; LESSIG, *supra* note 47, at 92-93.
[57] Meta doesn't give the exact numbers and it is hard to find a reliable, free source of statistics, but Facebook Community Standards boast about a community of more than 2 billion users, *cf*, Facebook Community Standards, *supra* note 53. For Instagram we can find numbers for 2021 and 2022 between 1.2 and 1.4+ billion of users, *cf. respectively* Statista, https://www.statista.com/statistics/183585/instagram-number-of-global-users/ (accessed 30 January 2023), and Kepios, https://datareportal.com/essential-instagram-stats (accessed 30 January 2023).
[58] LESSIG, *supra* note 47, at 60; Witt et al., *supra* note 46.

contain as much constitutional features as they do technical terms. Also, as Lessig noted in relation with AOL,[59] the constitution of Meta may not be entirely written[60] – it is also arguably more than the ToS and includes for examples Meta Principles,[61] among which Voice is paramount.[62]

Law finally, is the heart of our subject and maybe the easiest to compare to our traditional view of a legal system, as Meta has gone through great efforts of self-regulation and legitimization. In what corresponds to procedural law, Meta undertakes enforcement through algorithms, this time in their role in content moderation[63] and through human moderators. At Meta, it involves a process of flagging, escalation, deletion that relies on both the community of users and Meta's human moderators and artificial intelligence, that intervene *ex ante*, or *ex post*.[64] Substantive law includes primary rules, the Community Guidelines and Community Standards, i.e. rules about what content is allowed, but also the internal guidelines that guide moderators in applying these rules.[65] They also include secondary rules[66] such as the Charter of the Oversight Board.[67]

Let us turn to judiciary powers, as they are in our opinion what both make the difference between a law and a legal system and what clearly demarks Meta in that regards from other social media, and allows are understanding of Meta's platforms as a legal system without much doubt.[68]

Meta's Oversight Board, "Supreme Court of Facebook" was an idea suggested by Noah Feldmann and picked up by Mark Zuckerberg.[69] The vocabulary used by the Oversight Board also resembles legal vocabulary, although it is ambiguous. It aim to ensure "respect for free expression, through independent judgment"[70], it issues binding decisions[71] and policy advisory opinions. The Oversight Board ByLaws make reference to the review process internal to Meta as to "have exhausted appeals."[72] The system is thus quite developed, despite the existence of ByLaws reminiscent of private law. The references to the Oversight Board as a court and the vocabulary used function in my argument as, first, an element that adds to the conception of

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[59] America Online, an online service provide that functioned as a community, made of chatrooms where users could interact.
[60] LESSIG, *supra* note 47, at 60.
[61] Meta Principles, https://about.meta.com/company-info/ (accessed 30 January 2023).
[62] *See infra*, Chapter 3.3.
[63] Land, *supra* note 12, at 985.
[64] Meta, Transparency, https://transparency.fb.com/ (accessed 30 January 2023); Annex 1. *See also* Kate Klonick, *The New Governors: The People, Rules and Processes Governing Online Speech*, 2018, 131 HARV. L. REV. 1598 (2018), 1635-39.
[65] Land, *supra* note 12, at 983.
[66] On a more precise analysis of the emergence and meaning of secondary norms, *see* Schultz, *supra* note 43, at 163-168.
[67] Meta's Oversight Board is the judiciary instance of Meta, *cf.* Meta Oversight Board Charter https://oversightboard.com/governance/ (accessed 30 January 2023).
[68] On a more precise analysis of the emergence and meaning of secondary norms, *see* Schultz, *supra* note 43, at 163-168.
[69] Meta, Global Feedback and Input on the Facebook Oversight Board for Content Decisions, available at https://about.fb.com/wp-content/uploads/2019/06/oversight-board-consultation-report-appendix.pdf (accessed 30 January 2023); *Exclusive: The Harvard professor behind Facebook's oversight board defends its role*, FAST COMPANY (Aug. 7, 2019), https://www.fastcompany.com/90373102/exclusive-the-harvard-professor-behind-facebooks-oversight-board-defends-its-role.
[70] Oversight Board Home Page, https://oversightboard.com/ (accessed 30 January 2023).
[71] Oversight Board Bylaws, available at https://about.fb.com/wp-content/uploads/2020/01/Bylaws_v6.pdf (accessed 30 January 2023).
[72] *Id.*

Meta as a legal system and, second, the acknowledgement of Meta itself that its content moderation activity have legal effects that should be reviewed by an "impartial" body. How impartial it is in reality is not the concern of this chapter. I will not enter a complete analysis of the Oversight Board's functioning, self-regulating powers and pitfalls, as this has been done in more details than I could fit in this paper, but based on these observations and on other authors analysis,[73] it seems that Meta can fulfill the conditions of having a judiciary system.

2.2.2. Legitimacy and particularities of Lex Meta

For Michaels and Jansen, legitimacy "implies there is a reason for respecting a body of law other than the authority by which it was created, be it the authority of tradition or that of enactment."[74] It's arguable that states themselves recognize that platform law is a form of law.[75] There is no need for an especially "strong legalism" to give it this label, since it is recognized by state law itself: while states are reluctant to call it law and will the power of language to avoid recognizing the institutionalization of privately-made law, their attempt to regulate the way social media legislate is revealing.

In addition, arguably, although democratic legitimacy is a challenge for social media law – how does the whole community approve or disapprove of a norm? – it does not question the legal normativity of social media law, indeed it is not a new issue for a private law to pose problem of democratic legitimacy, or law in general for that matters.[76] Hence the question of whether what rules people's behaviours on Meta's social media is democratically legitimate is a question that can be reserved for the next chapter. As no law is truly democratic, and stems from expert considerations rather than people's consensus, I accept here that democratic legitimacy is not a necessary criterion for a law to be, or at least some democratic legitimacy is sufficient. As for Meta's recognition of itself as having created a legal system, it is unclear, to say the least. On the one hand, there is consistent reference to "the law", implying state law would be the only real law that exists[77], on the other hand it also uses the terms "Supreme Court."[78]

I want to stop here to recognize that Meta's law is unlike state law – but can any legal system claim a complete similitude to another? I present here some peculiarities, If I may say, of the Meta legal system.

Obviously, Meta is a corporation, not a state. As a tech company, they speak in the "we" form and apparently have liberal values, as reflected in their discourse. Their "Principles" or "Values" seem to go before their Community Standards, hence somewhat of normative superiority, as I hinted to in my analogy to a constitution. This is certainly not an ordering that is heard of in any recognized positivist conception of a legal system. Discourse reflects power as much as it is shaped by it, and a re-creation of the legal language, does not necessarily means

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[7373] *See, e.g.,* Lorenzo Gradoni, *Constitutional Review Via Facebook's Oversight Board: How Platform Governance Had Its Marbury V Madison*, Verfassungsblog (Feb. 10, 2021), https://verfassungsblog.de/fob-marbury-v-madison/#commentform.

[74] Michaels & Jansen, *supra* note 27, at 879.

[75] Kaye, *supra* note 12.

[76] Michaels & Jansen, *supra* note 27, at 881.

[77] *Cf. e.g.* Instagram Community Guidelines, *supra* note 53 "follow the law"; Oversight Board Bylaws, available at https://about.fb.com/wp-content/uploads/2020/01/Bylaws_v6.pdf.

[78] *Cf. supra* note 69.

Meta's law is not law – that would be a very formalistic assumption, but it might signal that Meta is not recognizing itself as a proper legal system.

Now on the democratic character of Meta's "constitution", Lessig described in relation with AOL, that the power lies with the architect of the online space, who makes the rules and controls that world. [79] No one can change the code except the architects themselves, and one can only resist by protecting oneself as much as possible or allowed, or by leaving.[80] In the architecture lies an extraordinary potential for power and control. It doesn't mean that Meta effectively has this amount of power, some it relinquishes through self-regulation, and some is *de facto* being regulated by external law.

A normative approach to pluralism needs be thought of carefully, as qualifying a system as law institutionalizes it and bears the risk of giving it the power associated with state law.[81] It is nonetheless evident that the power of law already lies in Meta's hand, or some of it. According to most conceptions of legal pluralism, platform law and Meta's legal system in particular as it is arguably the most developed one, appears to present the characteristics of a legal system.

3. THE REGULATION OF VOICE

3.1. Freedom of expression, other legal systems, and Meta

The United Nations Human Rights Council (UNHRC) has repeated in several resolutions that people have the same rights online as they do offline, and paramount is the freedom of expression.[82] Freedom of expression, much like law itself, can be seen as an instrument of power and liberation – and social media play a major role in exacerbating one or the other edge of the sword. This reflects the conflict inherent to the nature of the Internet, meant as the space of freedom *par excellence* and inevitably presenting as the prime space for abuse of that freedom.

In the State order of things, states generally have fundamental rights guarantees in their constitution. States must also, in theory, respect a law *above* their own, international law, which also contains human rights guarantees. It's always proven difficult for courts to strike the right balance between freedom of expression and other human rights. The jurisprudence of the European Court of Human Rights itself is not immune to bias, and I find it hard to justify the difference of treatment of hate speech between a case of Armenian genocide denial[83] and that of a Holocaust denial, other than by acknowledging a certain bias of the Court.[84] If states have different conceptions of freedom of expression, and supranational and international bodies are here to safeguard the core of the guarantee but are not immune to bias, what is Meta's conception among these and is it influenced by state and international law?

[79] LAWRENCE LESSIG, CODE: VERSION 2.0 (2nd ed. 2006), 92-93.
[80] *Id.*
[81] Schultz, *supra* note 43, at 155.
[82] U.N. Human Rights Council, U.N. Doc. A/HRC/47/L.22 (July 7, 2021), , at 1.
[83] Eur. Ct. H.R., Perinçek V. Switzerland, App. No. 27510/08 (Oct. 15, 2015)
[84] *See generally*, Pablo Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26 EUR. J. INT'L. L. 237 (2015).

Now, states and communities of states (the EU)[85] are trying to regulate what they conceive to be an order *beneath* them, the private regulation of speech. How to regulate social media platforms and how to strike the right balance between apparently conflicting values of privacy, safety and freedom of speech is a pressing global issue, and more than 70 States have either enacted national laws regulating social media or are considering it.[86] These three levels of regulation of speech, help us understand the interplay between different state and non-state legal systems, and the power contained in each of them.

Lessig had warned about this regulatory phase, as a reaction of an imposition of a certain vision of freedom of speech, arguably stronger than the most liberal version of it – the American First Amendment.[87] Indeed, at its beginning, Meta had very light regulations for freedom of speech on Facebook.[88]

In 2012, Mark Zuckerberg was seeing its platform as giving power to the people and making their voices heard, while urging governments to "become more responsive to issues and concerns raised directly by all their people rather than through intermediaries controlled by a select few."[89] His position marks the intent to be completely autonomous, facilitating civil society's conflictual dialogue with governments, almost counter-hegemonic. In 2019, it seems he had become a bit overwhelmed by this responsibility when he declared that "[l]awmakers often tell me we have too much power over speech, and frankly I agree."[90] In other words, Zuckerberg confirms that his company, in addition to possessing characteristics that assimilate it to a legal system, Meta is effectively regulating speech in way State law doesn't – or can't do. Whether non-state law develops not because of delegation or because of inability of the state is a question I can leave open.[91]

3.2. Voice in Meta's legal system

3.2.1. Voice in Meta's regulations

Lessig describes the vision of a prefect freedom of the Internet: "[p]eople could communicate and associate in ways that they had never done before. The space seemed to promise a kind of society that real space would never allow—freedom without anarchy, control without government, consensus without power. In the words of a manifesto that defined this ideal: 'We reject: kings, presidents and voting. We believe in: rough consensus and running code.'"[92] Mark Zuckerberg's vision for his social media is not different: he claimed that

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[85] *See* the EU proposal for a Digital Service Act, European Commission, Proposal for a Regulation Of The European Parliament And Of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (Dec. 15, 2020) available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN. It was approved by the European Union on Oct. 4, 2022, *cf.* https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

[86] *See, e.g. Moderating Online Content: Fighting Harm Or Silencing Dissent?*, OHCHR (July 23, 2021), https://www.ohchr.org/en/stories/2021/07/moderating-online-content-fighting-harm-or-silencing-dissent.

[87] LESSIG, *supra* note 47, at 236-37.

[88] *Id.; see also* Klonick, *supra* note 64, at 1620.

[89] Mark Zuckerberg, *Founder's Letter* (2012), https://m.facebook.com/nt/screen/?params=%7B%22note_id%22%3A261129471966151%7D&path=%2Fnotes%2Fnote%2F&refsrc=deprecated&_rdr.

[90] Mark Zuckerberg, *Opinion: The Internet Needs New Rules. Let's Start In These Four Areas*, THE WASHINGTON POST (Mar. 30, 2019), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.

[91] *But see* Michaels & Jansen, *supra* note 27, at 872.

[92] LESSIG, *supra* note 47, at 2.

Facebook was giving power to the people and making their voices heard against their governments.[93]

To please States is to make sure they remain in control of the law, that there is no non-state law.[94] Certainly then, platform law does present a potential for emancipation – from state law at least. But is Meta's law and enforcement effectively enabling any counter-hegemonic discourse in its platform? In a plurality of legal systems, it is possible for different law-makers to refer to the same law,[95] and this is sometimes the case with platform law, which refers often to "the law" or human rights principle. But being an independent legal system means that Meta also combine elements of different systems[96]: it refers both to its own standards and to the law, or to its standards and human rights.

There's no emancipatory potential inherent to the fact that we recognize a plurality of legal systems.[97] That there are several, interdependent and interactive legal systems is a fact I try to shed light on. Plurality allows for a diversity of visions, some of which could be emphasize values deemed more progressive, but it is not a given. De Sousa Santos suggests a litmus test to assess whether we're in cosmopolitan, subaltern legal plurality or a legal pluralism that perpetuates inequalities.[98] How does platform law regulate freedom of expression? There is an assumption to address: that social media are a space of free speech in the most liberal sense. They need either more regulation to avoid spread of hate speech and misinformation, or less regulation to stick to the foundational idea of the Internet, but they are in that sense conceived as independent from traditional state law.

Meta's primary goal appears to be the enabling of "Voice", as enshrined in its "constitution."[99] We note here the analogy with traditionally defined constitutions, but also that in the case of Meta, ToS make poor constitutional documents.[100] It was indeed a goal of the founders of the Internet, to enable a free, anarchist-like consent-based community where one could express oneself freely. In that sense, and once we've accepted platform law as a legitimate legal system, it bore the promises of being counter-hegemonic. It is thus necessary for our argument to verify whether platform law is itself emancipatory, or whether it simply reproduces power structures present in state law and does little for the re-appropriation of law by its subjects.

By redefining the limits and restrictions to freedom of speech, Meta has an overt agenda, enabling voices, and an (allegedly) covert agenda, profit. The intertwinement of market-driven and purportedly value-driven regulation is somewhat reminiscent of the historical relation between state law and capital, who, born together, keep sustaining each other.[101] This is dangerous because technology is malleable, like law and other human-made regulatory devices,

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[93] Mark Zuckerberg, *supra* not 82
[94] Thomas Schultz, *Non-Analytical Obstacles to Stateless Law*, 43 N.C. J. INT'L L. 182 (2018), 5-6.
[95] Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism*, 47 J. LEGAL PLURALISM & UNOFFICIAL L. 37 (2002), 69.
[96] *Id.*
[97] DE SOUSA SANTOS, *supra* note 10, at 101.
[98] *Id*., at 445.
[99] *Cf.* Meta Principles, https://about.meta.com/company-info/ (accessed 30 January 2023); Facebook Community Standards, *supra* note 53. Meta has different ways to represent its main values, principles or goals, but "Give People a Voice" appears first among Meta's five principles, and as the main goal of the Facebook Community Standards.
[100] Witt et al., *supra* note 46, at 565.
[101] PETR KROPOTKIN, LAW AND AUTHORITY: AN ANARCHIST ESSAY (1886) 8-9.

it can be changed to shape things differently.[102] In the case of Meta, changes are driven by profit, dictated by users as objects and not as subjects, and influenced by law only indirectly, as a regulatory of the market constraint.[103] This is, indeed, the proper of self-regulation: it is subject-driven.

Meta's definition of Voice is not only shaped by its purposes as a corporation to seek profit, its relation with governments, admittedly also tainted by a research for profit, also relativizes the social media's apparently very liberal version of freedom of expression, in what Lessig calls a "perfect dance of commerce with government."[104] According to the organization 7amleh, Meta effectively concludes private-public (censorship) partnerships to act at the government's requests and in its interests, and governments requests shape content moderation. The dance of Meta and Israel (and the Palestinian Authority) thus goes as follows: Palestinians need social media to build their resistance and they see it as an important tool - Israel contacts Meta to block unwanted content - Meta complies as it needs to function within Israel. Meta also wants the users to continue using Instagram, but it is arguably aware of the users' dependency on the platform and knows how to respond in case of a drop in engagement. After all, it is the architect of the space, it knows how it is used and how to optimize it so people keep engaging with it.

3.2.2. Meta's enforcement and Palestinian Voices

All in all, decision-making in the moderation of online content is biased, whether human-based or algorithm-based[105]: double-standards are flagrant when one has a mere look at over-enforcement practices, which unduly restrict the expression of marginalized communities, and under-enforcement ones, which allow the propagation of hate speech at the demise of marginalized communities. A study of where to find power in the legal systems of the social media is well-illustrated by the Palestinian example. There are several aspects to the interactions between Palestinians and Meta's platforms,[106] we focus here on three: the demotion of Palestinian stories during the Israeli airstrikes in the Gaza Strip in May 2021,[107] the deletion and suspension of posts and accounts,[108] and the way Palestinians use Instagram to bring more attention to their situation – this is the subject of chapter 4.

Algorithms are not some kind of alien technological force functioning in a vacuum. They're made by humans, they learn from human (although through machine learning, but they are arguably also programmed by humans) and they are linked to the social fabric. The decision-making process however is different, and we, as a society, have less experience in algorithm

[102] LESSIG, *supra* note 47, at 32.
[103] *Id.*, at 38, 125-30.
[104] *Id.*, at 80.
[105] In support of this affirmation, *see generally* BSR *supra* note 8; Klonick, *supra* note 64.
[106] While the main problems concern Instagram, I use both platforms as a shortcut, and because both Facebook Community Standards and Instagram Community Guidelines, *cf. supra* note 53, link to Meta's policies.
[107] *See* BSR, *supra* note 8.
[108] *See, e.g.* Ryan Mac, *Instagram Censored Posts About One Of Islam's Holiest Mosques, Drawing Employee Ire*, BUZZFEED NEWS, https://www.buzzfeednews.com/article/ryanmac/instagram-facebook-censored-al-aqsa-mosque (May 12, 2021), on the global deletion of content with the hashtag #Al-Aqsa, the third holiest Mosque in Islam and the place of police violence against Palestinians; *see also* Rayhan Uddin, *Bella Hadid claims Instagram 'shadow banned' her over Palestine post*, MIDDLE EAST EYE (Apr. 15, 2022), https://www.middleeasteye.net/news/palestine-bella-hadid-omar-suleiman-instagram-post-shadow-banned, on the ban of an international Palestinian West-based model. *See also generally* 7amleh, *supra* note 6.

decision making.[109] Hence algorithms may be biased just as humans are, and this is manifest in the amount of cases brought to the public's attention, both by media and NGOs, and by the Oversight Board, including many where Meta recognized that moderation was not in line with its own standards and internal policies.[110]

Examples of underenforcement, include the cases of Ethiopia and Myanmar, where the failure to moderate led to exacerbate violence against groups already victims of violence,[111] while overenforcement is the example of shadow bans, content deletion and demotion cited above, of which people posting Palestine-related content are regularly the target. In both case, already oppressed and marginalized communities suffer from these "mistakes", proving an undisputable bias – racism and discrimination are not created by technology.

In practice, it is it is hard to determine to what extent the decision is based on a human reasoning or an algorithm reasoning and the process lacks transparency.[112] In *ex post* moderation, Klonick usefully marks the difference between proactive and reactive moderation.[113] Although not the most used, *ex post* reactive moderation is relevant to the enforcement of Meta's policy on Dangerous Individuals and Organizations.[114] This policy is are based on American terrorist lists.[115] This contradicts the Internet's neutrality and in practice may lead to disporportionate application, notably to Palestinian organizations or parts of organization, such as Hamas' non-armed branch and people who appear to support them according to Meta's policies. In the *Al Jazeera Post* case,[116] Meta also refused to give more information on Israel's requests to remove content after being prompted to do so by the Oversight Board and did not give the reasons for this refusal, which again poses problems in terms of transparency and ability of the affected community to effectively engage with the laws imposed on them.

The overreliance on users, which has a practical, legitimization and triage function,[117] while it's laudable in terms of power distribution and democratic process, has its downfalls: the imbalances in resources and access to technology (cf. Palestine not access to technology) mean that users who have more resources will be more involved in moderating content. For Palestinians, access is influenced by the conflict, Israel's control of the infrastructure, and geo-blocking or person-specific social media ban.[118] On the other side of the spectrum, access to

[109] Council of Europe, Study On The Human Rights Dimensions Of Automated Data Processing Techniques (In Particular Algorithms) And Possible Regulatory Implications (2008), 7.
[110] *See, e.g.* Alia Al Ghussain, Meta's Human Rights Report Ignores The Real Threat The Company Poses To Human Rights Worldwide, AMNESTY INTERNATIONAL (Jul. 22, 2022), https://www.amnesty.org/en/latest/campaigns/2022/07/metas-human-rights-report-ignores-the-real-threat-the-company-poses-to-human-rights-worldwide/. For cases where Meta recognizes the error in moderation, *cf. e.g.* Oversight Board, Al Jazeera Shared Post, No. 2021-009-FB-UA (Sep. 14, 2021), https://oversightboard.com/decision/FB-P93JPX02/, *and more generally* Oversight Board Decisions, available at https://oversightboard.com/decision/ (accessed 30 January 2023).
[111] *See, e.g.*, Amnesty International, *The social atrocity: Meta and the right to remedy for the Rohingya*, (Sep. 29, 2022), https://www.amnesty.org/en/documents/ASA16/5933/2022/en/.
[112] Council of Europe, *supra* note 109, 8.
[113] Klonick, *supra* note 64, at 1638.
[114] Meta, Dangerous Individuals and Organizations, available at https://transparency.fb.com/policies/community-standards/dangerous-individuals-organizations/ (accessed 30 January 2023).
[115] *Id.*
[116] Oversight Board, *supra* note 110.
[117] Klonick, *supra* note 64, at 1639-39.
[118] On the work of Israel's Cyber Unit to restrict access to social media in collaboration with Meta, *see* 7amleh, supra note 6, 10.

more resources can mobilize both civil society and governments in creating group flagging of the content seen as undesirable: the Act.IL app was used by Israel with this purpose.[119]

To conclude, although the value of Voice is central to Meta's legal system and is arguably the value at the core of its constitution, and while we can acknowledge the important role of Meta in enabling spaces that offer great social potential, the enforcement mechanisms used by Meta undermine this potential. The interdependence between Meta's legal system and other legal systems, does not guarantee a better respect for freedom of speech, rather the interaction of these systems has the effect of exacerbating over-regulation. Hence, while Meta purportedly aims to liberate voices and give the power back to its users, this is not verified by our enquiry into its moderation practices – its law enforcement practices.

4. From Moderation to Emancipation: Are Palestinians creating a new legal paradigm?

It has been a constant underlying assumption throughout this thesis that social media are unlike other spaces: they defy the principle of territoriality and the conception of an international order, they seem extremely difficult to regulate and they, in turn, self-regulate. They are also based on a constitutional architecture of which the technical nature renders unintelligible to us, legal scholars. This technology, as Lessig recalled, "[w]e should expect—and demand—that it can be made to reflect any set of values that we think important. The burden should be on the technologists to show us why that demand can't be met".[120]

The critical theory of law applied in this work, after recognizing a plurality of legal orders (chapter 2) and the fallacy of legal positivism in separating legal and social theory, also calls for non-normative and anti-prescriptivist view of law that does not separate the legal subject from the legal matter, that is, a law that does not render individuals and communities subaltern but recognize their legal agency.[121]

According to De Sousa Santos, three principles supported modern social regulation, whether supported by the sovereign's will as a source of law (Hobbes), the market (Locke) or the consent of the community in a social contract (Rousseau), but in all cases, it was always intended that it would be exercised in the name of emancipation.[122] It is only later that the latter was absorbed by the former. In what De Sousa Santos paints as times of crisis of both social emancipation and social regulation, and to avoid an overly cynic vision, reinventing the tension between regulation and emancipation is a sound approach.[123]

I noted in the first chapter that the reliance of subaltern groups, and in particular the Palestinian people, on international law to resist the hegemonic rule of the international community, may seem counterintuitive; yet it has been central to Palestine's strategy in carving its place in the international conversation on its own fate.[124] In the virtual world too, Palestinians have been fighting for their self-determination. What makes it more interesting is that they are doing it as

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[119] Ishmael N. Daro, *How An App Funded By Sheldon Adelson Is Covertly Influencing The Online Conversation About Israel*, BUZZFEED NEWS (Sep. 20, 2018), https://www.buzzfeednews.com/article/ishmaeldaro/act-il-social-media-astroturfing-israel-palestine.
[120] LESSIG, *supra* note 47, at 32.
[121] Macdonald & Sandomierski, *supra* note 15, at 615-16; *See also* Tamanaha, *supra* note 33, 315.
[122] DE SOUSA SANTOS, *supra* note 10, at 36-37,43.
[123] DE SOUSA SANTOS, *supra* note 10, at 536.
[124] Imseis, *supra* note 23, at 198. *See also generally* ERAKAT, *supra* note 23.

a community individuals, as subjects, rather than as a state at the international level. For a people without a state, spread between exile throughout the world and their homeland, the non-territorial space of Meta is an opportunity to reconnect, socially and legally.

Palestinians, thus, are successfully using the tools available to them within that novel legal system to appeal violations against their freedom of expression. In every hegemonic system there remains thus an opportunity for counter-hegemonic discourse, a discourse that can shape the system.[125] Using platform law for self-determination is certainly already a powerful argument for the existence and relevance of non-state law. I posit here a second, bolder argument: that the actions and discourse of social media activists is shaping their legal environment and creating a new legal paradigm.

By posting relentlessly every violation to their rights happening in Palestine into the global Internet space, by sharing each other's posts and reporting every demotion, deletion and account suppression, by organizing themselves, they are shaping Meta's behaviour.

A change in discourse may be enacted within Meta's legal system, by using traditional ways of judiciary review such as that of first instance internal review, or "constitutional" review by the Oversight Board. What is more, by challenging content moderation, they are also recreating it: moderators themselves, also certainly *subjects-creators* have discussed the issues, bringing it to the knowledge of their own community and the company.[126] Users actions, of non-legal nature, have legal effects, and these might even be detected at the international level.[127] In that regard, there is also an interaction between several non-state legal systems, the "soft law" of the international community and the "private law" of Meta and its community – arguably, the soft/hard dichotomy does not make sense in our context, and it might be obsolete more universally that one dares to imagine.[128]

Why bother with all this language of law, if it does not matter? Giving the label of law, with all the authority it conveys, is in itself empowering.[129] As users, Palestinians are more than merely *law abiding*[130] and are clearly *law creating*. Thus the use of Meta's platforms by Palestinian reshapes the meaning of Voice as a constitutional principle, and continuously redefines is. Their discourse bears the full potential of power in itself. In the way they are (and users in general) re-claiming the freedom that social media is made to convey, they not only take control of some of the mechanisms of discourse selection and reproduction,[131] they are also reappropriating non-state law. This is only temporary, though, as social media law can be reshaped and re-modelled quickly.

CONCLUSION

The question that prompted my research was certainly a bit naive, in seeking to explore the potential of non-state law in being more emancipating than state-law, because indeed, it is not

[125] Discourse, Foucault??
[126] *See* Leaked Facebook Papers, Document TIER2_RANK_OTHER_0521, available at https://www.documentcloud.org/documents/21597619-tier2_rank_other_0521 (accessed 30 January 2023).
[127] *See, e.g.,* Albanese, *supra* note 4.
[128] *See generally* Joost Pauwelyn, *Is It International Law or Not, and Does It Even Matter, in* INFORMAL INTERNATIONAL LAW MAKING 125 (Joost Pauwely et al. ed., 2012).
[129] Thomas Schultz, *Non-Analytical Obstacles to Stateless Law*, 43 N.C. J. INT'L L. 182 (2018), 5-6.
[130] Martha-Marie Kleinhans & Roderick A. Macdonald, *What is a Critical Legal Pluralism?*, 12 CAN. J.L. & SOC. 25 (1997), at 39 and further reference.
[131] *See generally* MICHEL FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE (1969).

a characteristic of law to be emancipatory or non emancipatory, "emancipatory or non-emancipatory are the movements, the organizations of the subaltern cosmopolitan groups that resort to law to advance their struggles."[132] It is however also not a characteristic of law to be linked to the state. State law is admittedly central to the plurality of legal systems that order the world, but it is not unique, which I hope I made clear in Chapter 2 of this thesis.

I have tried to explain the adequacy and relevance of an understanding of legal systems as plural and potentially subject-centered to capture the reality of the evolutions of social norms and technological norms in the context of social media. I have also demonstrated that Meta has effectively created a new legal system. It is imperfect, like all legal systems, and together with other legal systems, they form an interdependent plurality.

In chapter 3, I ventured to explore the interactions between Meta's law and traditionally defined law in relation with freedom of expression. While social media has had a greatly enabling role in bringing the Palestinian questions back to the forefront, their right to freedom of speech is repeatedly violated by non-state law, which reproduces the power dynamics of state law and international law that they are already subjected to. The particularities of platform law bring our attention to the risks associated to private actors law-making, as they are operate within the hegemonic order and are constrained by state-law and market.

Finally, I have tried to demonstrate that the legal system created by Meta is being effectively reshaped by Palestinians through the power of voice. While I'm unsure of whether Meta needs more power than it already has, social movements and subaltern, oppressed and marginalized groups certainly could benefit from a recalibration of the balance. However, to accept a broad conception of law is an epistemological effort that can not afford to be selective. To recognize that users of platform are shaping their legal environment is to accept that the platform itself also does, and when the platform is governed by commercial interests and regulated by states, law can only be one of the tool to shape normative systems and advance the Palestinian struggle – the reinvention and the creative power of the subaltern need to happen in other normative spaces, too.

[132] DE SOUSA SANTOS, *supra* note 10, at 385.

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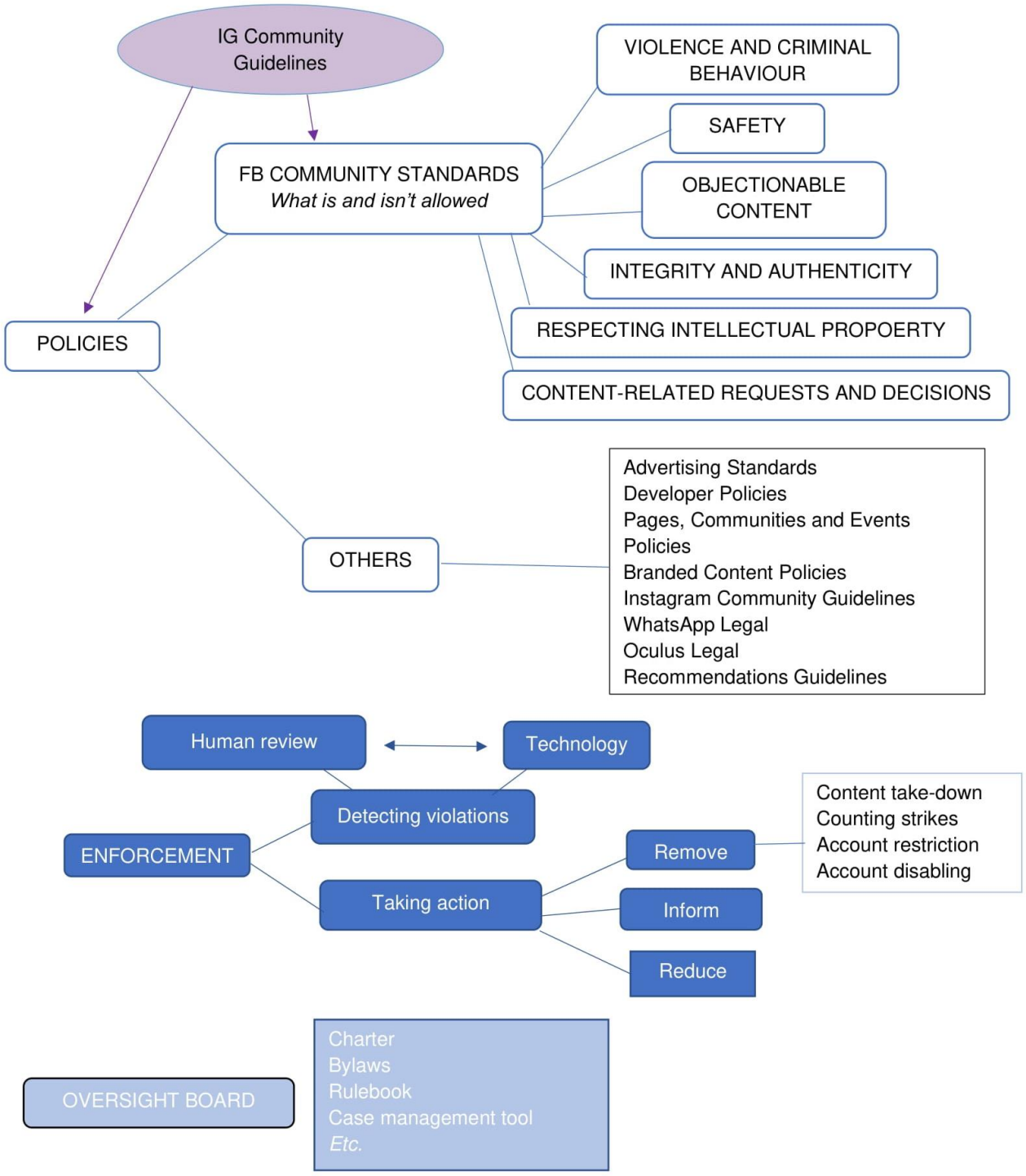
Annex: A Map of Meta's Transparency Page[133]



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