



Terms of Service as Law of the Platform

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ITU Regional Workshop

Luca Belli, PhD
luca.belli@fgv.br
@1lucabelli



1. Platforms as **cyber-sovereigns**
2. The compatibility of Platform **ToS** with **HR**
3. A **multistakeholder** policy **suggestion**



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Private ordering and the rise of terms of service as cyber-regulation



Luca Belli, *Center for Technology and Society, Fundação Getulio Vargas Law School, Rio de Janeiro, Brazil*

Jamila Venturini, *Fundação Getulio Vargas Law School, Rio de Janeiro, Brazil, jamila.venturini@fgv.br*



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tinyurl.com/BelliToS

Platform:

“every applications allowing users to seek, impart and receive information or ideas according to the rules defined into a contractual agreement”





Dynamic Coalition on Platform Responsibility
Outcome Document n°1 L. Belli, P. De Filippi, N. Zingales (eds.)



10th Internet Governance Forum – November 2015

RECOMMENDATIONS ON TERMS OF SERVICE & HUMAN RIGHTS

Introduction

The following recommendations aim at fostering online platforms' responsibility to respect human rights, in accordance with the UN Guiding Principles on Business and Human Rights, by providing guidance for "responsible" terms of service. For the purpose of these recommendations, the term "responsible" should be understood as respectful of internationally agreed human rights standards. Besides identifying minimum standards for the respect of human rights by platform operators (standards that "**shall**" be met), these recommendations suggest best practices (which are "**recommended**", or "**should**" be followed) for the most "responsible" adherence to human rights principles in the drafting of terms of service.



1. Platforms as Cyber **Sovereigns**



Belli L., & De Filippi P. (2012). “**Law of the Cloud v Law of the Land: Challenges and Opportunities for Innovation.**” *European Journal of Law and Technology*, Vol. 3, n°2



**Terms of Use → “Law” of the platform
(with transnational application)**



Online Platforms as **Private Sovereigns**

Quasi-**legislative power** → definition of **ToS**



Online Platforms as **Private Sovereigns**

Quasi-judicial power → **dispute** resolution

Online Platforms as **Private Sovereigns**

Quasi-**executive power** →
design of the platform
“**architecture**”
+
algorithmic
implementation of ToS



Susan Strange (1988):

Structural Power

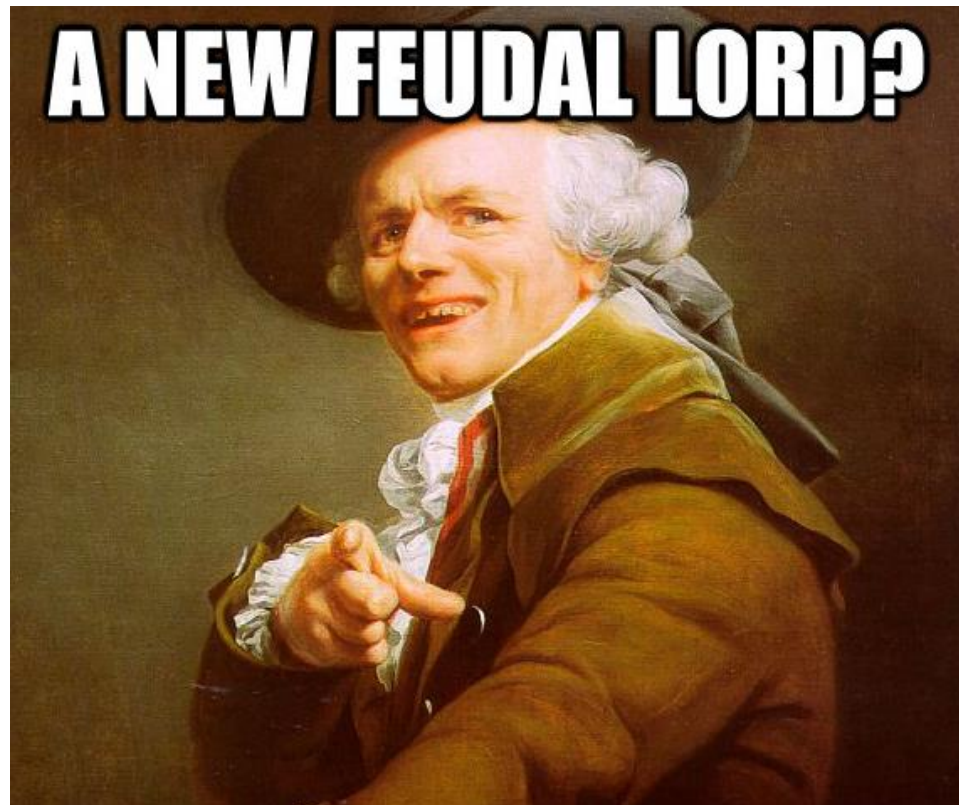


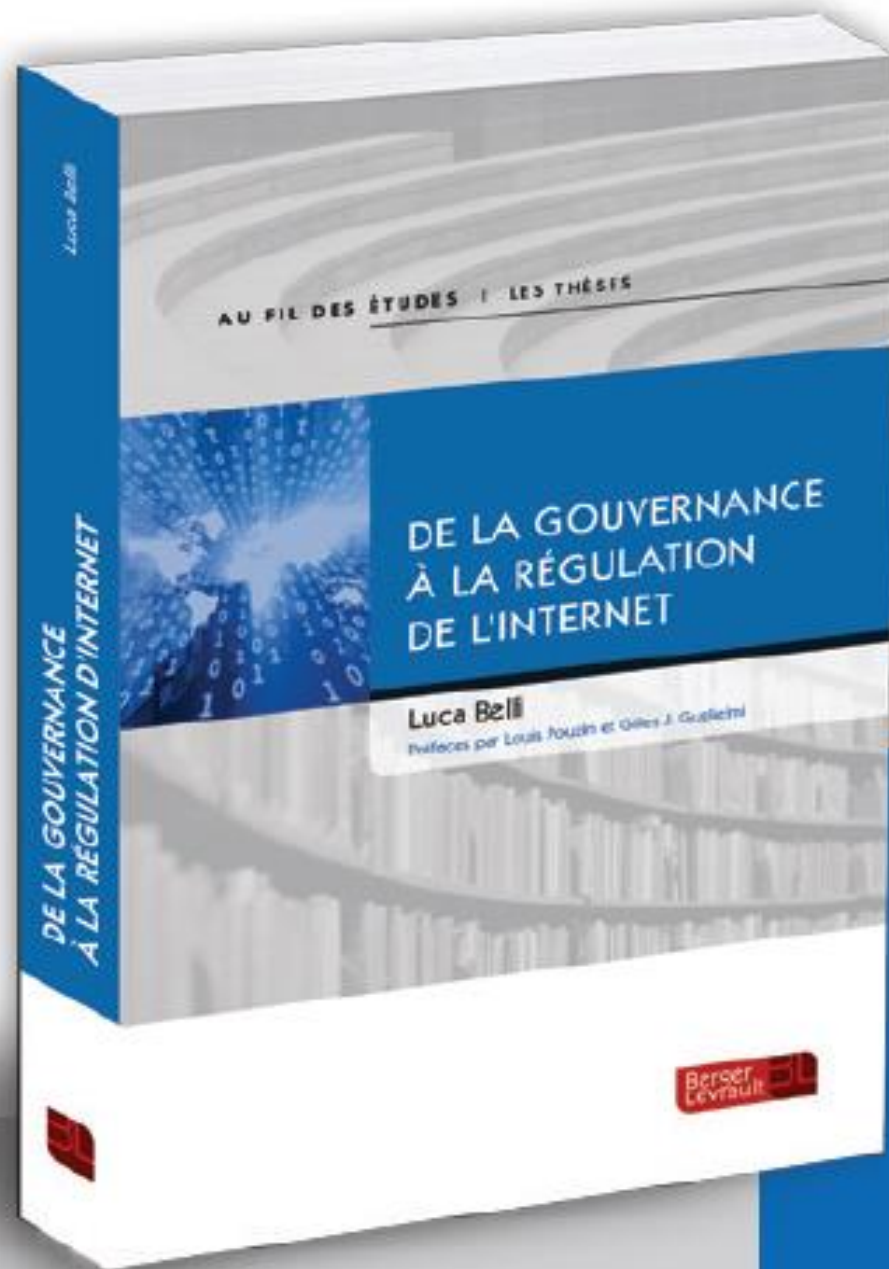
Structural power:

the power to decide **how things shall be done**

the power to **shape frameworks** within which
(natural or legal) **persons relate** to each other

Online Platforms as Private **Sovereigns**







Is platforms' power **unlimited**?

UN Guiding Principles on Business and Human Rights (2011)

*“enterprises have a ‘corporate **responsibility** to **respect** all human rights”*



UN HRC General Comment 31/2004

*“positive **obligations** on States Parties to **ensure** human rights [and protect] individuals against acts committed by **private persons or entities**”*



CM/Rec(2014)6 on a **Guide to Human Rights for Internet Users**

*“The **obligations of States to respect, protect and promote** human rights include the **oversight of private companies**.”*

*Human **rights** [...] **prevail over** the general **terms and conditions**”*

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2. **Compatibility** of Platform **ToS** with **HR**



**JAMILA VENTURINI
LUIZA LOUZADA
MARILIA MACIEL
NICOLA ZINGALES
KONSTANTINOS STYLIANDOU
LUCA BELLI
EDUARDO MAGRANI**

TERMS OF SERVICE AND HUMAN RIGHTS

AN ANALYSIS OF ONLINE PLATFORM CONTRACTS

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FGV DIREITO RIO



Editora Revan

tinyurl.com/toshr



Three pillars:

- 1) Freedom of **Expression**
- 2) **Privacy** & Data protection
- 3) Right to **Due Process**



General considerations

- Difficulty in **identifying applicable contracts**

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- **Technical language and ambiguous terminology**

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- Difficulty in identifying applicable contracts
- Technical language and ambiguous terminology
- **Lack of important information, essential** to express consent

*“Individuals should spend **8 h** a day for **76 days** every year to read the privacy policies of the **websites** they visited on average”*

The **Cost** of Reading Privacy Policies

(McDonald & Cranor 2008)



*Users frequently consider **Terms of Service** and **Privacy Policies** as a **nuisance** due to their **length** and **complexity** as well as their **overwhelming number***

Obar and Oeldorf-Hirsch (2016)

What are the study **outcomes**?



Freedom of Expression

Abusive content

70% include mechanisms for **reporting abusive content** and requesting **removal**





52% state that **removal of content** does
not need to be reported

No notification is required when **Freedom**
of Expression is **restricted**

The worst thing
about censorship
is [REDACTED]
[REDACTED].

If you share “**inappropriate**” content

88% of platforms explicitly state that they can **terminate accounts without notification**



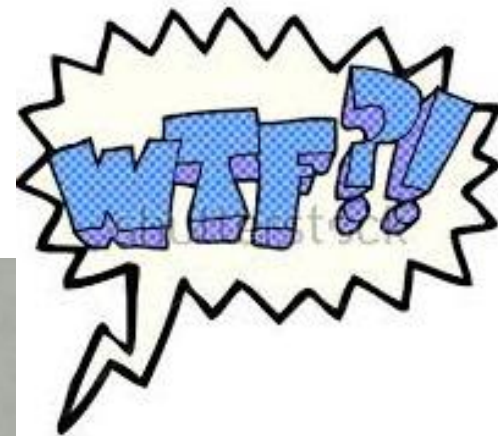


Anonymity or use of pseudonyms

32% of the analysed platforms do not allow anonymous use or the use of pseudonyms

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Privacy & Data Protection



66% of the analysed ToS **explicitly state** that users will be tracked in other websites



and **80%** foresee that **third parties** may **monitor** users' activities



62% state that **user data** will be **shared** with **third parties** (platform partners) **by default**





Right to **Due Process**

ToS can be altered unilaterally

Only 30% of platforms state that **users will be notified** in case of ToS modification

12% affirms **users will not be notified** in case of modifications

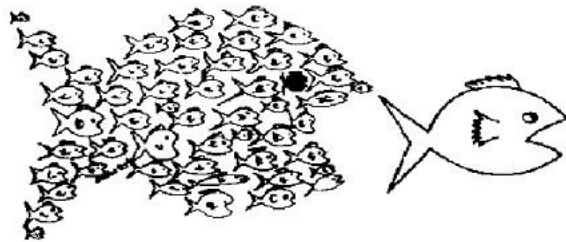
No Notifications



Limitations on **access to justice**

26% require that by accepting ToS **users waive their right to initiate a class action**

CLASS ACTION



86% include **choice of law** clauses





3. A **multistakeholder** policy **suggestion**



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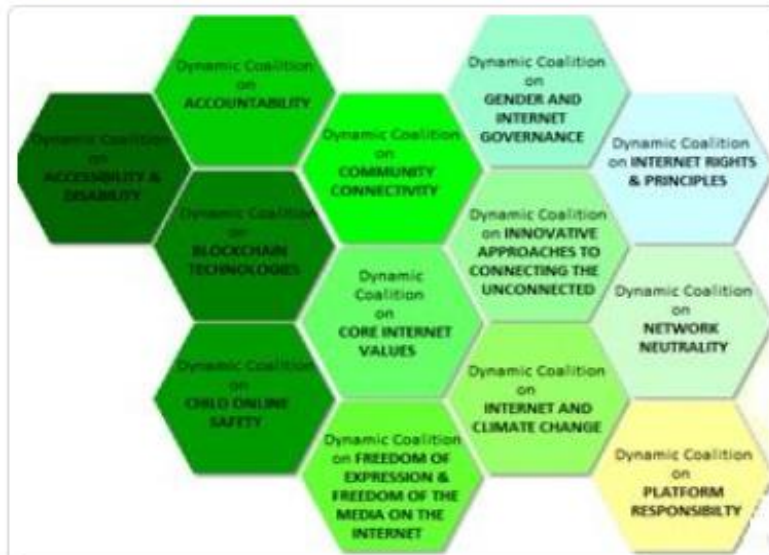
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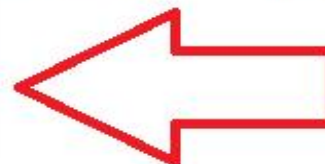
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The concept for Dynamic Coalitions first emerged at the IGF's inaugural meeting in Athens, with a number of coalitions establishing themselves at that time. The coalitions are informal, issue-specific groups comprising members from various stakeholder communities.

Dynamic Coalitions welcome collaboration with anyone interested in contributing to their discussions.



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DRAFT Recommendation on the **roles** and **responsibilities** of Internet **intermediaries**

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To conclude

- **ToS** are one of the dominant **regulatory tools** of **cyberspace**

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- Businesses have the **responsibility to respect** international **HR** and the **duty to respect** national **laws**

To conclude

- ToS are one of the dominant regulatory tools of cyberspace
- Businesses have the responsibility to define ToS compatible with international HR and the duty to respect national laws
- **Multistakeholder processes** can provide **useful suggestions** to **policymakers AND** to **business players**



**Thank *you*
for *your* attention!**