Epistemic Rights and Digital Communications Policies: Collective Rights and Digital Citizenship

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INTRODUCTION: COMMUNICATION AND CITIZENSHIP REVISITED

The mass popularisation of the internet in the 1990s coincided with the heyday of civil society discourses, and the proposition that the internet is the product of the activity of heroic individuals, and exists primarily to empower civil society, remains a dominant *leitmotif* of digital technology politics. The focus of internet governance debates has frequently been about how best to minimise the power of the state and maximise the capacity of non-government organisations to engage in different forms of multi-stakeholder governance (Scholte 2017). The rise of the global internet was seen by authors such as Joseph Nye as strengthening the soft

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power resources of countries 'whose dominant culture and ideas are closer to prevailing global norms (which now emphasise liberalism, pluralism, and autonomy)', meaning that

> the larger long-term trends are in America's favour. To the extent that official policies at home and abroad are consistent with democracy, human rights, openness, and respect for the opinions of others, the United States will benefit from the trends of this global information age. (Nye, 2002, pp. 70, 73)

More recently, the decentralising promise of Blockchain technologies—and a Web3 movement that claims back the internet from the global digital platform giants—also points in the direction of reviving the civic potential of digital technologies of the 'bottom up' empowerment of citizens in the face of corporate and state power (Siddarth et al., 2022).

It is important to note that this is only one way of thinking about the relationship between communications technologies and citizenship. A quite different tradition identifies the role of state organisations as being critical in promoting citizenship discourses and civil society in the face of monopolising forces in commercial media. Historically, as Krishan Kumar has observed, civil society was seen as synonymous with the state and 'political society', generating the institutions that enable 'civility' and the engagement of citizens with public life, and it is only from the late eighteenth century that it begins to be conceived of as a realm that is necessarily autonomous of the state (Kumar, 1993). Political theorists who were strongly associated with the revival of civil society as a new animating political principle, such as John Keane, nonetheless saw the relationship between civil society and the state as mutually reinforcing, observing that 'without the protective, redistributive and conflict-mediating functions of the state, struggles to transform civil society will become ghettoized, divided and stagnant, or will spawn their own, new forms of inequality and unfreedom' (Keane, 1988, p. 15). Arguing the importance of the role played by the nation-state in the production and circulation of culture, Tony Bennett concluded that 'public spheres […] are brought into being not merely outside of and in opposition to the bureaucratic apparatuses of the state but also within those apparatuses or in varying degrees of quasi-autonomous relations to state bureaucracies' (Bennett, 1992, p. 235).

Developing the concept of media citizenship, Peter Golding and Graham Murdock drew upon T. H. Marshall's three-fold typology of civil,

political, and social citizenship to propose an agenda for communications policies that foregrounded citizenship rights (Murdock & Golding, 1989). Golding and Murdock argued for an expansive conception of communication rights that included the following: (1) maximising access for individuals to information, advice, and analysis concerning their rights; (2) providing all sections of the community with access to the broadest range of sources of information, interpretation, and debate on issues that affect them; and (3) enabling people from all sections of society to recognise themselves in the representations offered in communications media and to be able to contribute to the development and shaping of these representations. The necessary conditions for communications and information systems to achieve these communication rights were maximum possible diversity of provision, mechanisms for user feedback and participation, and universal access to services regardless of income, place of residence, or other sources of social inequality.

This is a different conception of rights to that which prevails in the early years of internet discourse. The dominant discourse of this era was one where rights were understood primarily in terms of what Zittrain and Bowers have referred to as 'the "Rights" era of internet governance, a period […] during which public and regulatory conversations focused almost exclusively on protecting a maturing sphere of internet discourse from external coercion, whether corporate or governmental' (Bowers & Zittrain, 2020, p. 2). Underpinning such discourses was a distinction between two types of speech: that associated with traditional media (publishers) that had moved into the online domain, and which would continue to be subject to laws associated with media and communications policy, and that which was associated with what was termed user-generated content (UGC). The latter was seen either as having direct constitutional protections—as with the First Amendment speech rights of the United States Constitution—or as having implied human rights protections, as with Article 19 of the Universal Declaration of Human Rights and the UN International Covenant on Civil and Political Rights (Kaye, 2019).[1]

[1] Article 19 of the Universal Declaration of Human Rights guarantees: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Underpinning the UDHR, the United Nations International Covenant on Civil and Political Rights states, in Article 19, that: 'A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and enjoyment of other […] rights'.

This version of online rights discourse and legislative protections which followed from it, such as Section 230 and related 'safe harbour' provisions, arose from what can be termed a pre-platform age of the internet, where the space of UGC in the overall media landscape was relatively circumscribed. However, with the platformised internet and 'the rise of a handful of dominant internet platforms that indexed and pointed to everything else online, the line between UGC and content from traditional publishers blurred' (Bowers & Zittrain, 2020, p. 3). While much ensuing discussion has been about content moderation and balancing speech rights and potential online harms, this conversation can be extended to consideration of epistemic rights. As Hannu Nieminen observes in his chapter in this volume, the idea that citizens need to be equally capable of making informed choices about matters of societal importance is by necessity accompanied by the requirement of epistemic rights, that 'citizens have equal access to all relevant information and knowledge necessary for informed will formation'. We thus find contemporary debates around digital rights and citizenship turning to questions of the public sphere and the institutions that underpin it, which now include digital platforms alongside media institutions, and cultural and governmental institutions.

The 'Double Movement' of Platforms and Power

It is a commonplace to observe that digital platforms, and the companies that own and operate them, are powerful. The U.S. Congress identified the 'Big Four' tech companies—Google (Alphabet), Apple, Facebook (Meta), and Amazon—as having gatekeeper power in the digital economy, which enables them to control access to markets, accrue competitive advantage, and cut off competitive threats and potential rivalries (U.S. House of Representatives, 2020). I have observed elsewhere that this economic power, which can have upstream and downstream consequences at odds with the public interest, intersects with political power, or the capacity to shape public policy and civic discourse, and communications power, or the capacity to act as 'powerful gatekeepers of online speech and implicitly as regulators of digital communication' (Flew, 2021, p. 201; c.f. Flew & Gillett, 2021).

At the same time, the observation that large companies possess power is not new and is certainly not new with regards to media and communications. John Thompson (Thompson, 1995) identified four forms of power: political, economic, coercive, and cultural or symbolic. A fundamental

assumption of the political economy of the media approach, and indeed of all traditions of media economics that focus upon economies of scale and market concentration, is that

> [l]arge-scale economic actors in the media field—the Hollywood majors, the large telecommunications companies, television networks, cable companies, the emerging leviathans of search and online services—exercise great power over what is produced, how it is produced, and possibly also, in some of the cruder versions, how it is received. This is *economic* power—the ability to control processes of production, distribution, prices in markets, and accumulation. (Cunningham et al., 2015, p. 54)

Is it right, then, to be focusing upon platform power as something new, rather than as an extension of forms of media power recognisable in a lineage that runs from Randolph Hearts and Lord Beaverbrook through to Rupert Murdoch and Silvio Berlusconi? Have we been, as Dwayne Winseck has suggested (Winseck, 2020, 2022), overly focused upon digital dominance and the power of 'Big Tech' companies and neglected the continued and substantive economic, political, and cultural power associated with traditional media and telecommunications companies?

Cioffi et al. (2022) provide important insights to these questions by bringing the arguments of Karl Polanyi to bear upon the question of platform power. As Polanyi identified with the Industrial Revolution, Cioffi et al. observe that the digital revolution has involved more than the rise of large companies with a degree of monopoly power: it has entailed the rise of a new institutional form (platforms) whose societal influence is now pervasive, whose impact on social and economic life is profound and transformational, and where the largely unchecked private market power associated with its rise has triggered social and political mobilisation to challenge such power, or what has come to be known as the 'techlash'. Drawing upon Polanyi, they argue:

> Contemporary society is at one of those rare historical inflection points in the constitution (or re-constitution) of socio-economic relations. At such moments, societies experience a 'double movement' dynamic in which the reorganizational power and prerogatives of private interests and organisations imposing a utopian ideal of the self-regulating market (the first movement) drive a reassertion of political authority and thus broader societal interests (the second movement). This engenders a struggle within which social forces attempt to create regulatory and governance mechanisms to

constrain and potentially redirect political economic and social development in new ways and often along unexpected developmental trajectories. (Cioffi et al., 2022, p. 2)

There are many dimensions to platform power and to the 'double movement' dynamic as identified in this analysis. A key point is the extent to which platforms, and platform companies, have become core digital infrastructure (Plantin et al., 2018; Plantin & de Seta, 2019). From the direct provision of wireless and broadband infrastructure to cloud hosting and e-mail to referrals and login services, the largest platform companies are providers of infrastructure without which the digital economy would cease to operate. Apple and Google are providers of maps that are used by millions of businesses around the globe; digital apps are almost exclusively distributed through Apple and Google; Google accounts for 90% of online search worldwide; Amazon, Microsoft, and Google account for 65% of global cloud infrastructure market share (Richter, 2022); and so on. The extent to which not only businesses but civil society organisations are exposed to the decision-making of the biggest digital platform companies became apparent in Australia in February 2021, when Facebook's decision to cut off Australian news providers from its global news feed in response to the government's proposed Mandatory News Media and Digital Platforms Bargaining Code adversely impacted upon hundreds of arts, community, and non-profit organisations that would not be considered to be 'news providers' (Bossio et al., 2022).

The second key element to platform power is the extent to which it has framed a way of thinking about socio-economic challenges that has wider implications beyond the tech sector. In particular, it has consolidated around what Elisabetta Ferrari has termed 'technocratic populism' (Ferrari, 2020), evolving from earlier discourses such as the 'Californian ideology' of 'free minds and free markets' (Barbrook & Cameron, 1996; Rossetto, 1996; Turner, 2006). Ferrari identifies the discourse of technocratic populism as having three elements: (1) it 'portrays digital technologies as inherently free, democratic and supportive of personal autonomy' (Ferrari, 2020, p. 121); (2) it identifies digital technologies as the primary means of addressing social problems, rather than policy changes; and (3) it proposes that technologies and markets better represent popular will than nation-states and political institutions. As Fred Turner, the historian of Silicon Valley cyberculture, has observed:

One of the myths that the tech world has hoisted on us is that the state is, itself, evil ad that it doesn't represent the people. Instead, only the tech world represents the people because they are busy collating the people's voices with search engines and social media. (Lusoli & Turner, 2021, p. 238)

This bring us to the third dimension of platform power influence, which is over public policy. It is well documented that the major digital platform companies invest heavily in corporate lobbying of governments and seek to influence both policies that directly impact upon them (e.g., copyright laws, payments to publishers) and those with a more indirect impact (e.g., immigration policies, education, and skills) (Popiel, 2018, 2020; Teachout, 2020; Tech Transparency Project, 2020; Zuboff, 2019). The wider influence is around the capacity to offer appealing visions of the future and a capacity to solve problems for governments, and to do so more quickly and effectively than government agencies or bureaucracies can. Examples such as Facebook setting up a quasi-legal infrastructure to adjudicate on its content decisions through the Operating Board, or Microsoft CEO Satya Nadella declaring that the COVID-19 global pandemic meant that 'the challenges we face demand an unprecedented alliance between business and government' (Nadella, 2020), draw attention to the power of digital platforms to offer problem-solving capabilities to policymakers. More generally, the rise of global digital platform companies is associated with the turn towards governance solutions that adopt multi-stakeholder models that focus on 'soft law' and the inclusion of non-government organisations, as distinct from traditional 'top-down' public policy instruments associated with media and communications regulation (Flew, 2022b).

Technocracy and Populism in Tech Policy

There is currently a degree of political contestation around the world towards platform power and social limits to its exercise. As Cioffi et al. observe 'the current efforts to regulate the platform economy reveal a renewed contestation of the balance and, more fundamentally, the nature of the relationship between public and private power' (Cioffi et al., 2022, p. 2). In different jurisdictions around the world, and in liberal democracies as well as authoritarian and one-party states, there are new laws and regulations being proposed to address the underlying causes as well as consequences of platform power, across areas such as competition and

market dominance, content regulations and laws governing online speech, and user rights with regards to privacy, data use, and ethical standards in the tech sector (Flew, 2022b; Flew & Gillett, 2021; Flew & Su, 2022; Kretschmer et al., 2021). Importantly, while previous forms of political action were often couched through the language and the institutions of global internet governance—particularly around the rights of NGOs and civil society to shape digital platform conduct internationally—the current actions have been framed far more at the level of nation-states. The Canadian communications theorist Blayne Haggart has argued that 'democratic accountability is (or should be) the source of legitimacy in global economic governance. Given a pluralist international society and the absence of a global polity, this accountability is lodged firmly within the nation state' (Haggart, 2020, p. 334). While this does leave open the risk that regulators will govern too much, and potentially chill innovation and diverse speech, there remains the question of what ultimately constitutes legitimate authority, since 'someone, at the end of the day, must exert structural power over these platforms' (Haggart, 2020, p. 332), and democratically elected governments—whatever the flaws in practice of their political systems—possess an overarching legitimacy which is not held by platform companies themselves.

In thinking about the political landscape in which proposals to regulate digital platform companies have emerged, it is useful to reflect on the work of the French economist Thomas Piketty. In *Capital in the Twenty-First Century* (Piketty, 2014), Piketty argued that capitalism has an inherent tendency to increase inequalities in the absence of countervailing measures on the part of governments to redistribute income and wealth. He also argued that, on the basis of extensive worldwide evidence of global economic inequalities increasing from the 1980s onwards, there had been a turn away from redistributive economic policies on the part of governments and that the political process had seen both an increase in economic inequality and the rise of political forces that sought to both justify and facilitate such a transfer of wealth from the working and middle classes to the rich. Similar arguments have been developed by a number of critical theorists, including Branko Milanovic (Milanovic, 2019) and Wolfgang Streeck (Streeck, 2017).

The 'Piketty paradox' is the question of why this worsening economic situation for much of the world's population has not, at least in the liberal democracies, led to a decisive swing in political sentiment towards parties of the left and policies of economic redistribution? In particular, while the

aftermath of the Global Financial Crisis of 2008 saw left-wing governments come to power in some countries, such as Greece and Portugal, a more electorally significant outcome has been the rise of populist movements, parties, and leaders (Moffitt, 2020; Norris & Ingelhart, 2019). One factor behind this, which is explored at length in Piketty's (2020) book *Capital and Ideology* (Piketty, 2020), is the degree to which parties of the centre-left increasingly became the parties of the most highly educated. While this did not necessarily mean that parties of the right became parties of the less well-educated, it did point towards an increasingly fragile 'Upstairs Downstairs' coalition among parties of the centre-left, where they sought to represent both traditional working-class constituencies, those with more cosmopolitan cultural values, and what Piketty terms the 'winners of globalisation' (Piketty, 2020, p. 816)—highly educated and well-paid cognitive elites located in major global cities and information technology hubs. This formation has been open to attack from an anti-elitist populism, associating globalisation and technological change with rising economic insecurity and the weakening of nation-states and national cultures (Eatwell & Goodwin, 2018; Freiden, 2018; Goodhart, 2017).

Addressing the power of digital platform companies would be consistent with a broadly redistributive and egalitarian political programme that Piketty describes as participatory socialism (Piketty, 2020, ch. 17). But the policies on offer need to navigate a tension between technocracy and populism. Technocratic approaches have tended to focus primarily upon the dangers presented by government intervention, drawing upon international human rights laws to propose overarching frameworks that can supersede the interventions of national governments: examples include digital constitutionalism, social media councils, and multi-stakeholder councils overseen by companies themselves (Celeste, 2018; Docquir, 2019; Kaye, 2019; Suzor, 2018). By contrast, populist measures to rein in 'Big Tech' can be motivated by democratic ideals (Klobuchar, 2021; Teachout, 2020), but can also be driven by anti-democratic principles, such as populist leaders wanting to extend speech controls into the digital realm or indeed to overturn restrictions developed by platform companies themselves. We have seen such measures undertaken by U.S. Republican governors in states such as Texas and Florida, where attempts have been made to use the courts to overturn content moderation decisions made by social media companies on the grounds that they 'censor conservative voices' (Associated Press, 2022). Philip M. Napoli has argued that the Trump Administration's threats to 'Big Tech' with adverse legislation

were primarily symbolic in nature, appealing to the suspicion of Silicon Valley liberalism among his supporter base while leveraging better terms from such tech companies in instances where Trump or other Republicans were operating in ways at odds with the ostensible rules of the platforms (Napoli, 2021).

Epistemic Rights and the Return of the Collective

Epistemic rights provide an important vantage point from which to address the challenge of developing policies that address the challenges of platform power. In doing so, there is the challenge of avoiding a purely administrative approach that fails to address underlying power relations and a populist reflex that pursues short-term political advantage rather than longer-term structural change. A variety of policy measures are now being enacted or are under substantive consideration, ranging from antitrust and behavioural regulation to new offences around illegal and harmful content, issue-specific rules (e.g., rules around online advertising content during elections), binding ethical codes and rules, and privacy and data security measures (Tambini & Moore, 2022). The European Union has been at the forefront of such changes with a range of initiatives, including:

- *Digital Services Act*, which aims to secure fundamental rights online, balancing safeguards for freedom of information and expression with targeted measures to restrict illegal content online, ensure greater algorithmic transparency and accountability, strengthen regulations of online advertising, and provide special 'duty of care' obligations for Very Large Online Platforms (VLOPs) with over 45 million monthly users in the EU.
- *Digital Markets Act*, which aims to promote competition in online markets, by setting limits to the power of the largest digital platforms to exercise 'gatekeeper' power through controls over re-use of personal data, in order to enable new competitors to enter key digital markets.
- *Media Freedom Act*, which aims to promote competition in European media markets so as to secure media pluralism, as well as measures to safeguard news quality and enhance protection of journalists.

Policy responses will always have a technocratic element due to the complexities associated with the operation of digital platforms. In doing

so, a recurring challenge for policymakers is going to be the extent to which they are reliant upon information held within the companies—what Frank Pasquale refers to as the 'black box' (Pasquale, 2015)—in order to regulate their conduct. For this reason, among others, digital platform regulation is also going to need a 'populist' element so as to establish what policy theorists refer to as the 'issue salience' of a topic or the extent to which concerns about digital platforms are a priority for voter-citizens, particularly given other, more immediate priorities and the nature of the electoral cycle (Moniz & Wleizen, 2020). The importance of addressing platform power needs to reach beyond those who have been typically the most engaged with digital technologies, to build a wide constituency of support for measures to redress the undue exercise of platform power. This is often more difficult than would first be apparent, and more challenging than with regards to other industries with a history of market concentration and economic and political power. It is very common for measures by nation-states to regulate digital platforms to meet criticism from NGOs that accuse them of over-reach and the suppression of free speech, even when those NGOs are themselves calling for greater regulation of private communications power as well as expressing concerns about state censorship. This can sound like a modern version of the plea of Saint Augustine when faced with temptations, 'Lord make me chaste, but not yet'. The modern equivalent may be 'Let there be more Big Tech regulations, but not those ones' (Flew, 2022a, p. 301).

Daniel Joyce has observed that these are not bad faith arguments, but rather are reflective of an optimistic vision both towards the transformative capabilities of digital technologies and about the capacity of online speech to build a more informed public (Joyce, 2022). An exemplary example from the early history of the internet would be Electronic Frontiers Foundation co-founder Mike Godwin's observation: 'Give people a modem and a computer and access to the Net, and its far more likely that they'll do good than otherwise' (Godwin, 1998, p. 23). Joyce notes that there has been a shift in discourse over time towards greater recognition of the potential for risk and harms arising from largely unregulated, or self-regulating, digital platforms having significant power over the circulation of online speech as seen, for example, in the work of Jonathon Zittrain (Bowers & Zittrain, 2020; Zittrain, 2008). But the underlying sense that nation-states lack both the legitimacy and competence to effectively regulate digital platforms without doing more harm than good or generating a

'slippery slope' that threatens personal privacy and other online freedoms is not hard to find among digital activists, academics, and NGOs.

It is in this respect that advocates for epistemic rights and other measures that aim to rein in or achieve greater social responsibility with platform power may need some populist appeal. While populism is most commonly associated with right-wing nationalists, 'strong men', and would-be authoritarians—think Trump, Orban, or Putin, for instance—a number of authors have made the point that there are left-wing as well as right-wing populisms (Judis, 2016; McKnight, 2018; Mouffe, 2018). Invoking some version of 'the people' is a common strategy when seeking to build a cross-class alliance for substantive reforms, particularly when they face the prospect of resistance from powerful corporate and other vested interests. Benjamin Moffitt observes that there is considerable conceptual and historical affinity between populism and socialism, as left-wing politics frequently appeals to 'the people' and unaccountable or undemocratic 'elites' (Moffitt, 2020).[2] In order for measures to regulate digital platforms to not simply result in various forms of regulatory capture, it is highly likely that technocratic solutions will not be sufficient. In order to achieve ongoing political and policy mobilisation, there will be a need to engage with those who may not be as engaged in an ongoing way with digital technologies as self-defined thought leaders in the field, in pursuit of a more inclusive vision of digital citizenship.

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[2] One notable critic of 'left populism' is in fact Thomas Piketty, who argues that '"populism" […] mixes everything up in one indigestible stew' (Piketty, 2020, p. 962). He critiques left-populists (e.g., Mouffe, 2018) for prioritising anti-elitist rhetoric over the development of programmatic strategies for social change. In terms of the discussion in this chapter, this would entail an anti- 'Big Tech' rhetoric that lacks policy content, similar to the critique that Napoli makes of the U.S. Republicans' approach to tech companies during and since the Trump Presidency (Napoli, 2021).

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