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Done is better than perfect: Evidence, Governance, Power and Platform Regulation

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Abstract

The widespread emergence of regulatory proposals for platform companies internationally is a significant shift from reliance on the 'governance' model alone, a product of the age of 'progressive neoliberalism' (Fraser, 2019). Recent years have seen a strengthening of state discursive and analytical capacities in various jurisdictions as legislators, regulators and governments seek to move beyond the assembling of evidence on market activity to engage with fundamental questions of the power of platforms and the ways in which their business models affect democratic norms. The move towards regulation, covering a range of fields, and with a number of policy drivers, is unlikely to be tidy, consistent, or based on utility-style legislation. Instead, platforms will be subject to a series of concurrent regulatory interventions from national governments and multi-national institutions such as the European Union. Regulation is always a contested process which platforms and their critics will challenge, including through post-regulatory litigation.

Keywords: Regulation, Governance, Evidence, Platforms, Discursive Capacity.

Biography

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Introduction

In the summer of 2019, as Facebook geared up to enter the world of crypto-currency, the Governor of the Bank of England, Mark Carney, issued a stark warning on behalf of central bankers worldwide: 'unlike in social media, for which standards and regulations are only now being developed after the technologies have been adopted by billions of users, the terms of engagement for any new systemic private payments system must be in force well in advance of any launch' (Carney, 2019). We have no evidence that Carney had ever read Raymond Williams' work, but Carney's message recognised a fundamental truth which Williams articulated almost forty years ago: 'the moment of any new technology is a moment of choice' (1985: 146). In other words, arguing against technological determinism, Williams meant that 'the development, take-up and use of technologies are all shaped by the social relations of the world into which they enter' (Freedman, 2002, p427).

Carney was articulating a notion which had been all but jettisoned in the era of 'progressive neoliberalism' (Fraser, 2019, p10): the concept of the precautionary principle, the idea that the impact of new developments should be considered for their potential downsides as much as their upsides, for the negative externalities that they could impose on society. Associated with this was the principle that the cost of addressing those negative externalities should fall on the agents responsible: in the environmental field, for example, that the polluter should pay. This was a statement about the need for 'anticipatory regulation' (Mulgan, 2017). Ultimately, of course, Facebook's crypto plans failed (Murphy and Stacey, 2022).

Perhaps it is no surprise that a leading representative of 'contemporary financialized capitalism' (Fraser, 2019, p35) should articulate so clearly the dangers of Facebook crypto-currency and the failures of social media regulation. Protecting the financial system has been of superior importance to protecting and enhancing democracy in recent times, as right-wing parties (such as the Republicans in the US) and movements (like the Brexit movement in the UK) have broken the bounds of existing political norms, drawing on the affordances of social media to segment audiences ruthlessly both through comment and through advertising (Turow, 2013; Zuboff, 2019), training their dog-whistles to target the rabbit-hole.

Of course, it was never entirely true that social media companies, or search engine companies, or app store owners, or digital marketplaces, were unregulated: they depended on a system of regulation (company law, intellectual property law, and financial services regulation) which guaranteed for them and their founders the rights to enjoy their profits in perpetuity. They weren't *unregulated*: they were *under-regulated* (Andrews, 2020a). But the myth of the absence of regulation persisted, alongside what Collins (2009, p11) termed the 'three myths' of internet governance: the myth that the internet was better when the market decided; the scholarly myth that network governance and self-regulation could be applied to 'the internet' as a singular entity; and the myth that the governance of the internet was somehow separate from the governance of legacy media.

This chapter draws on empirical evidence formerly presented elsewhere (Andrews, 2019a and b; 2020a and b), based on detailed documentary analysis of governmental, regulatory, legislative, company and judicial materials, as well as observation of legislative proceedings and interaction with legislators and regulators, and technology media monitoring, with some updating for this volume. My main interest has been in advertiser-

funded platforms such as Google and Facebook, although I have looked at 'Big Tech' platform power more generally. I follow the House of Lords Select Committee on Artificial Intelligence in defining 'Big Tech' as companies 'who have built business models partially, or largely, focused on the "aggregation of data and provision of cloud services" '(House of Lords, 2018, p45).

Permissionless innovation, governance and evidence

The language of the era of progressive neoliberalism in respect of international communications regulation requires deeper study, though some have made a start (Peters, 2016; Leary, 2019) but particularly relevant to this volume are governance, evidence-based policymaking, and permissionless innovation. In reverse order, the period of progressive neoliberalism, following on from the privatisation of the internet and its governance (Carr, 2016), promoted the virtues of permissionless innovation (Cerf, 2012; Golumbia, 2014; Dotson, 2015) as an alternative to the precautionary principle. As Lessig wrote (2010), reviewing Aaron Sorkin's film *The Social Network,* in setting up Facebook, Mark Zuckerberg didn't need permission, '*from anyone'.* Facebook was arguably identified most closely with the rise and fall of progressive neoliberalism: Barack Obama's supporters 'looked like Facebook' said a Clinton aide dismissively. Facebook co-founder Chris Hughes helped coordinate Obama's online presence, Obama's inauguration was live-broadcast in a joint Facebook-CNN operation compèred by Randi Zuckerberg, Facebook's head of consumer marketing. Mark Zuckerberg hosted Obama at a Facebook 'town hall' meeting in 2011. But by the time of the US presidential election won by Donald Trump in November 2016, Obama was warning that fake news on Facebook was creating 'a dust cloud of nonsense' (Andrews,

2020b), arguably a confession of failure of the regulatory system and the abandonment of the precautionary principle.

The study of *governance* has erupted during the last 30 years in a number of academic disciplines. For one of its foremost scholars, Rod Rhodes (2011, p29), the analysis of governance reflects on the hollowing out of the state, the increase in international economic transactions and 'the shift from government to network governance….the state increasingly depends on networks of other organisations to secure its intentions and deliver its policies'. As Collins said (2009: 55), in relation to the internet, governance theorists frequently relied on a 'pervasive utopian sentiment' that the internet was and should be ungovernable. The language of governance and networks aligned with 'the emergent internet culture' and its 'dominant imagineries' (Flew, 2021, p140). In practice, the absence of regulation or international treaties meant that the rules of internet governance were imposed by the most powerful actors, whether states or private corporations. In many parts of the world, Facebook, as the United Nations says in its report (2018, p341) on the genocidal assault on Rohingya Muslims in Myanmar, 'is the internet'. Additionally, the United States has sought to export its own anti-regulatory environment internationally through trade treaties which seek to exclude platforms from data and other laws (Andrews, 2020b). With the bulk of key platform companies originating in the United States, American discourses on speech (including paid advertising), data, competition policy, regulation and innovation had been able to dominate, with stronger pushback coming in Europe and Australia in recent years (though there is the prospect, under the Biden administration, of a tougher domestic response, judicially and through regulation, in the US). Until recent years, the strategy of progressive neoliberalism had thus contributed to the undermining of the Westphalian-based ethical notions of national regulation (Fraser, 2009:, p20). Governance theory often appears to contain a fatalistic

assumption that regulation is either impossible or undesirable and that state capacity is forever under-resourced: at the very least, and the capacity of states to regulate has been thoroughly underestimated, including by critical scholars and activists (Flew, 2021: 246). Indeed, the 'platformized internet' may be easier to regulate than the decentralised internet that preceded it (Flew, 2021, p43). The use of 'regulation' rather than 'governance' seeks to re-establish both the role of the state in promoting countervailing power (Galbraith, 1952 (1963)) and as a site of contestation for power. Koop and Lodge (2017) have demonstrated that uses of the term 'regulation' in academic discourse can often spill over into discussions of governance in any case, including forms of self-regulation.

Deleted: (democratic)

One further concept from the era of progressive neo-liberalism was that of evidence-based policy-making. In its idealistic version, of course, the notion that policy should be based on the best evidence sounds entirely reasonable. But evidence can be and is contested; powerful interests can control the flow of information to lawmakers, burying them in extraneous and loaded detail; the complexity of data-driven machine learning models and their proprietorial control has meant a situation of information 'asymmetry' (CMA, 2019, p23) exists between strategic market players and competition authorities and regulators. So in this most recent era, the notion of 'the platform' as a neutral, innocuous, form of enterprise has been reinforced by the discursive power of the companies themselves (Gillespie, 2010). Policy-making involves a process of persuasion, argument and framing of issues and trusted sources matter (Andrews, 2017) and shortcuts and emotions influence decisions (Cairney, 2016). The process of regulation is also a 'struggle' (Pohle et al, 2016), reflecting the disproportionate material, political and discursive power of Big Tech.

In the communications field, the drive for evidence-based policy underpinned the development of the UK's communications regulator, Ofcom, which has contributed genuinely ground-breaking research to shape policy and decisions during the twenty years of its existence, and has at times also opened up space for wider deliberative discussion and 'diverse forms of participation in public debate over media policy' (Lunt & Livingstone, 2011, pix). Stemming from its dual mandate to consider the impact of communications policy on both consumers and citizens, Ofcom's regulatory purpose had from the start 'elements of both neoliberal economic policy and social democratic intervention' (Lunt & Livingstone, 2011, p29). Ofcom's work, which included conceptual as well as market research, is an exemplar of a regulator with significant *discursive capacity* (Andrews, 2019a) as well as analytical capacity. This distinction can be traced back in UK policy-making as least as far as the 1970s, in the account of the Chair of the Prime Minister's Central Policy Review Staff, Victor Rothschild, who maintained a somewhat Kantian separation between synthetic and analytical thinking: 'synthetic thinking is typically required when the thinker is not presented with an already formulated question or problem, or set of questions and problems…. synthetic intelligence has to invent the terms in which future analytical thinking is to be conducted, and also to invent, or impose, new criteria of success' (Rothschild, 1977, pp97-8).

Lunt and Livingstone provide a valuable summary of the debates around evidence-based policy, noting that some models of evidence and policy interaction are more palatable to academic researchers than others (2011, p!57). As they note, the achievement of evidence-based policy, where evidence is produced 'within external fields of expertise that have their own agendas' (p145) – ais difficult, and empirical evidence is only part of the story, as policy decisions are ultimately determined by 'value judgements' (160). In novel fields such as the emergence of new technologies with significant 'information asymmetry' between

proprietary platforms and regulators, this requires significant discursive capacity (Andrews, 2019a).

Additionally, while *e*vidence is one factor underpinning regulation, the desire to act, or to legislate, is also underpinned by emotion. We should not underestimate the importance of emotion in the making of legislation. As Iosifidis and Andrews comment (2019: 222) 'moral panics have their uses'. The Cambridge Analytica exposure, and the Christchurch killings, and the suicide of Molly Russell have been notable triggers (Andrews, 2020a; Flew, 2021). Facebook, for example, has acknowledged that 'unfavorable media coverage could negatively affect our business' (Facebook, 2016: 13).

Platform power and the failure of evidence-based pollcy-making

There are at least seven ways in which the power of the platforms challenged governments and regulators in their evidence-collecting exercises over recent decades. First, the provision of ostensibly free services to consumers evaded the dominant orthodoxy in competition policy, that of the consumer welfare standard: only latterly was it understood how the mining of personal data was a price the consumer paid for access to services (Bundeskartellamt; 2019; ACCC, 2018; CMA, 2019; Furman, 2019). Second, the accumulation of data in itself was not originally understood as central to the operations of the largest platform companies, and certain acquisitions, notably Facebook's acquisition of Instagram, were allowed through without effective scrutiny (OFT, 2012; Srinivasan, 2019; Wu, 2018). Third, the scale of the platform companies, the speed of their growth and their internal secrecy, reinforced by the rewards systems for their staff, meant that there was significant information asymmetry between them and state authorities, which meant that

private deals which might have engaged the attention of competition authorities and regulators never came to light until recent court cases (on this, see Andrews 2020a); Fourth, the complexity of the companies' own models, including the algorithms which shaped search, or social media newsfeeds, or programmatic advertising, were immensely complicated and not easy for outsiders to understand, requiring immense efforts to build state regulatory and discursive capacity in new spheres; Fifth, the US base of the key platform companies – Facebook, Google (including Youtube), Amazon, Apple – and the robustness of US policy in seeking to export US deregulatory norms, coupled with a tendency to argue that others, notably Europe's competition commissioner, Margrethe Vestager, were unfairly picking on US companies (Andrews, 2020b: 103) – raised questions of the territorial legitimacy of the regulatory space; sixth, what has been called 'platform transience' (Barrett and Kreiss, 2019) - the platforms themselves changed as entities over time, in terms of their business operations, their acquisitions and entry into new markets, their algorithms and their policies; seventh, the power of the companies to buy up expertise, to recruit staff from regulatory bodies and government departments, supporting extraordinary and well-funded lobbying operations (see Wofford, 2022), and aggressive litigation of regulatory and judicial decisions, or proposed decisions, were designed to out-manoeuvre regulators and delay ultimate sanctions.

In this situation, 'evidence' has been contested and platform power has been exposed time and again. The strategic market power of the Big Tech companies is now widely understood. Approaching dominant platforms as utilities has been strongly argued (Crane, 2018; Rahman, 2018a and b; Ghosh, 2019; Winseck,2019). The UK's Furman review (2019) accepted that they shared some of the features of ntaural monopolies but said that it was too early to conclude that competition policy could not work.

Many commentators focus on the uniqueness of the platforms and their business models. Furman (2019) notes that the csale of the data they collect and the centrality of that data to their business model is unique. There was clear concentration in certain markets such as search, social media and online advertising, and incumbents had a significant data advantage which was a barrier to entry and therefore likely to lead to unchallenged persistent dominance because of their market power.

Platforms have significant economic power, but also social and political power (Stigler, 2019; CDEI, 2020). They have what Pasquale (2017) called 'functional sovereignty.' Platforms operate not only on a scale bigger than previous regulatory challenges, giving them structural dominance, but also have explicit political and social aims and perform genuine civic functions (Moore & Tambini, 2018).) They have become indispensable to users as they seek to become 'the operating system of our lives' (Vaidhyanathan, 2018).

The re-assembling of state capacity and the rebirth of the regulatory imperative

As Schlesinger (2020, p1557) notes, recent years have seen a 'regulatory turn' which is concerned with rule-setting for the new 'communicative order'. This has played out in a number of different jurisdictions, including Australia, Canada, the European Union, national-level legislation in some of the EU's member states including France and Germany, India, the United Kingdom and the United States. Many others are considering proposals (Puppis and Winseck, 2020). While each jurisdiction is in a different phase of regulatory development and intervention, many of the issues concerned are similar and there has been significant

cooperation, and in some cases coordination, by legislatures, governments and regulators (International Grand Committee, 2018; HM Treasury, 2018; CMA, 2019).

There is both public pressure and market pressure to regulate. Public pressure is magnified by media coverage: as just one example, the UK Information Commissioner's investigation into Cambridge Analytica was explicitly triggered by reports in the UK *Observer* newspaper (ICO, 2018). Market pressure has been seen in the campaigns by advertiser and media interests (Iosofidis & Andrews, 2018; Flew & Wilding, 2021), as well as by deliberate policy interventions by competitors, such as Apple's changes to its privacy controls which have had a $10 billion adverse impact on Facebook (Facebook, 2022, p10). Judicial proceedings have also been a form of corrective action. They have exposed company practices that appear anti-competitive (Collins, 2018). Even the deals they have struck with regulators may be challenged by their own shareholders, as Facebook is finding in Delaware, where its decision to settle with the FTC for $5 billion over Cambridge Analytica, arguably to prevent its CEO Mark Zuckerberg having to testify, has been challenged by two groups of shareholders (Delaware, 2021a and b), as an alleged excessive payment damaging to shareholder interests. Courts are coming to the conclusion that class actions are a necessary part of the process: the judge in a case (current at the time of writing in 2022) brought by advertising interests concerned with Facebook's allegedly inflated advertising metrics, said that 'no reasonable person' is likely to pursue their claims on his or her own, given the cost and resources needed to challenge Facebook in court (Reuters, 2022).

Meanwhile, company whistle-blowers have become more courageous, more visible and more vocal, with Facebook whistle-blower Frances Haugen recently name-checked in President Biden's State of the Union address (White House, 2022).

Although 'online harms' often attract the bulk of media attention, the new challenges to platform power principally come from the intersection of data protection policy and competition policy. Most recently, national security issues have come to the fore, not least in the context of Russia's invasion of Ukraine (Newton, 2022), although these were evident earlier in relation to the question of Russian interference in elections and referendums and in the response of the 'Five Eyes' governments to Facebook's plans for full encryption of digital messaging and the potential risk to policing of terrorism and child abuse (DNI, 2017; Special Counsel, 2019; Home Office, 2019). Schlesinger (2022, p3) has noted how these are particularly relevant in the UK's geopolitical positioning following Brexit, as the government 'conceives of the United Kingdom as a national security state'.

The issues where regulatory action is clearly in evidence internationally include online harms such as hate speech, disinformation and 'fake news'; competition policy, mergers and anti-trust; data rights, data protection and privacy; encryption, national security and public safety; regulation of algorithms, including their design, accountability and transparency; the online advertising market including programmatic advertising; consumer protection including in the field of financial services; child protection and age-appropriate design; electoral law including the use of data analytics; electronic currencies and the stability of the financial system; international taxation of digital services; and the sustainability of independent media.

Ofcom (2019) and others (for example, Bundeskartellamt, 2019; ACCC, 2018) have drawn attention to the interlocking nature of these issues, and argued that market failures may have a significant impact on, for example, the development of online harms. This economic perspective restores political economy to the heart of discussions about platforms, rather than a narrow focus on measures to address harms through platform liability for harmful and illegal content alone. Ofcom argues that market failures can contribute to consumer and societal harms, including competition, consumer, data protection, cyber security, media policy, content policy and public health, and interventions can benefit from tackling several market failures at once, tackling several harms at once, and effective 'trading off' of specific harms. Platforms have an incentive to maintain attention and accumulate personal data, and this logic drives approaches to privacy, content, diversity exposure, addiction, data analytics and algorithms, personalization of advertising, information asymmetry and behavioural biases. Ofcom's economic analysis identifies 'complex interactions' which require cooperation between regulators, and in the UK, as Schlesinger has noted (2022) this has led to the creation of the Digital Regulation Co-Operation Forum (DRCF), building on the UK's tradition, developed in financial services, of 'concurrent regulation' which involves supervisory actions by different regulators simultaneously. Concurrency, said the DRCF, would have three benefits; coherent regulation, strategic responses to industry developments, and shared skills and capabilities (Schlesinger, 2022, p9).

This turn towards regulation has been accompanied by, and aided by, a significant re-assembling of state expertise, with the mobilisation of expert opinion in a number of ways, as governmental and regulatory institutions have built their analytical and discursive capacities in this field. This analytical and discursive capacity has often been built by the recruitment of external expertise. So the UK government appointed a 'Digital Competition Expert Panel',

chaired by Jason Furman, former Chief Economist to President Obama, to address the issues in digital markets, leading to the advocacy of a 'pro-competition' approach (Furman, 2019). The European Union's Competition Commissioner, Margrethe Vestager, appointed a team of three Advisers to review competition policy for the digital era (EC, 2019). Most recently, the Biden administration has made a series of appointments of leading academic competition specialists, including Lina Khan and Timothy Wu, to key regulatory and policy roles (White House, 2021a and b). All governments require analytical capacity (Lodge & Wegrich, 2014), but new problems require substantial discursive capacity (Andrews, 2019a) also.

Discursive capacity involves the organisational and conceptual ability of governments and regulators to manage a deliberative process of problem-sensing, problem-definition and problem-solving (Hoppe, 2011), engaging with policy actors within a specific sphere of activity. These policy actors may be better resourced - and this is certainly true in the field of digital platforms - to shape the public policy discourse than the governments or regulators who have to determine the public interest. The challenge for governments, and regulators, is to identify and cultivate the skills necessary to address or head off emerging policy challenges: discursive capacity requires the ability to frame problems in terms that are capable of an accepted, shared and endorsed public or political consensus (Andrews, 2019a). Governments develop their discursive capacity in an iterative process with regulators, legislators, experts and public views canvassed.

Law, as Ezrachi (2017) says in the context of competition regulation, is a social construct. Weick's description (1995, p31) of the making of law as a sense-making act is particularly helpful: 'when people enact laws, they take undefined space, time and action, draw lines, establish categories, and coin labels that create new features of the environment

that did not exist before.' We need to conceive of regulation not as the passage of a defined piece of legislation or set of regulatory rules but as a *process*, commencing with sense-making around a specific problem area, discursive interaction between public, industry, regulatory and legislative actors (both in legislatures and in governments), the development of and passing of the necessary legislation, the implementation – again, with likely further discursive interaction – of regulatory rules and administrative arrangements, decision-making on particular regulatory breaches and the imposition of remedies, and their effective agreement and adoption or appeal and/or litigation against the decisions. It should be noted here that major 'Big Tech' companies, notably Facebook and Google, regularly, if not routinely, litigate regulatory decisions against them. But Big Tech is now under substantial pressure, facing concurrent litigation and regulation in many jurisdictions.

Conclusion: Done is better than perfect

At the time of writing, European Union institutions have just agreed the text of the Digital Markets Act. The Online Safety Bill has been introduced into the UK Parliament. Members of the European Parliament recently passed the Digital Services Act. Legislation is proceeding in other jurisdictions. The regulatory process is underway. It will sit alongside platforms' own governance systems but platforms will face more direct challenges on their implementation of their own rules. The legislative process will be messy, and there will be battles over which companies are subject to the legislation and future regulations. It may not only those companies which the EU calls Very Large Oniine Platforms that are captured. Different interests and different regulatory mandates and their logics will shape the struggle over legislation. But to take one example of current legislation, the UK Online Safety Bill, it would be hard to argue that the process had not been deliberative, after a series of committee

reports in the UK Parliament (House of Commons, 2017, 2018, 2019, 2022; House of Lords, 2019, 2020; Joint Committee, 2021).

There is a clear demand from legislators around the world to put in place a framework of regulation around Big Tech. This is unlikely to take the form of comprehensive Digital Platforms Acts (Feld, 2019), or frameworks which treat platforms as utilities. Legislation will be developed in a number of policy fields, from content to competition, data to design of algorithms. It is likely, based on history, that legislation and subsequent regulation will be challenged and litigated by the major platforms, at least in the initial stages of implementation. But the age of progressive neoliberalism is over. As Fraser says (2019), even conservative commentators in the United States are looking to create alternatives to neoliberalism, and the same is true of the UK (Timothy, 2022). In respect of platform regulation, the 2017 Conservative Party manifesto in the UK perhaps set out this 'regulatory turn' most starkly: 'Some people say that it is not for government to regulate when it comes to technology and the internet. We disagree' (Conservative Party, 2017). Platform regulation is one area where the different interests of conservatives and progressive politicians are coming together in favour of legislative action (Flew, 2021, p 210). Legislation is unlikely to be ideal. The process of regulation, from start to finish, will be messy. But legislators in many jurisdictions now appear to have united on an old Facebook slogan: done is better than perfect.

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