Digital Services Act: Towards the *Digital Rule of Law*

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Abstract This chapter analyses the link between the Digital Services Act (DSA) and the *rule of law* principle, arguing that the new Regulation contributes to the affirmation and development of a *digital rule of law* in the European Union. Some of the obligations set forward in the DSA materialise the principles arising from the *rule of law* applied to the digital ecosystem and departing from the need for a strong "digital constitutionalism" in the algorithmic society. While formally private, digital giants manage materially public spaces, that form to the new "digital public sphere", in which private actors perform functions and exercise powers that traditionally belong to public authorities. The intervention of constitutional law is required considering the primary function of the *rule of law*: to temper power wherever it is and regardless of who exercises it. Focusing on the new procedural obligations introduced by the DSA, the article describes how the DSA is articulated with the *digital rule of law*.

Keywords Digital Services Act · Rule of law · Digital rule of law

1 Introduction

In the wake of the 6 January 2021 attack on the US Capitol by a group of Donald Trump supporters, two social networks—Twitter (now X), Facebook, and Instagram—decided to suspend the account of the President of the United States of America (Buchanan et al. 2021). At the time, Donald Trump had 88 million followers on Twitter (Collins and Zadrozny 2021), often using that social network as a megaphone for his political positions, as a means of political and electoral campaigning, and as a privileged form of outreach to his supporters and the general public. The suspension, decided by Twitter on 8 January, was permanent and justified by the

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G. Enes et al. (eds.), *A Digital Europe for Citizens*,
https://doi.org/10.1007/978-3-032-02500-5_11

digital platform with two tweets published by the former President[1] and how they were «being received and interpreted on and off Twitter».[2] Said content allegedly violated the platform's terms and conditions regarding the "Glorification of Violence Policy". Notwithstanding, both tweets invoked by the social network do not in themselves contain any direct appeal to violence or, using the words of the platform's terms and conditions, glorify violence in such a way as to «inspire others to replicate violent acts», so much so that Twitter felt the need to explain the reasons and factors that led the social network to interpret those tweets as a form of glorification of violence and, consequently, a violation of its policies, which led to the permanent suspension of Donald Trump's account.

As for Facebook and Instagram, where Trump had respectively 35 million and 24 million followers,[3] the platforms started to suspend the former President's account for 24 h and then moved to suspend it «indefinitely and for at least the next two weeks until the peaceful transition of power is complete».[4] META's Oversight Board eventually reviewed Facebook's decision. This Board, which began operating in 2020, seeks to be an independent body replicating a "high court" that reviews the social networks' decisions on content moderation and issues recommendations regarding platform policies (Wong and Floridi 2023), while is considered to be in a «twilight zone between being a decisionmaker exercising immensely consequential power, and being a made-up body that exists at the whim of its creator» (Douek 2024), with no state-given mandate to adjudicate on the interpretation or application of fundamental rights, especially the right to freedom of expression.

The Oversight Board, albeit recognizing that «Facebook has become a virtually indispensable medium for political discourse, and especially so in election periods», maintained that Donald Trump's posts violated the social network's terms and conditions but severely criticized the sanction imposed by Facebook, even going so far as to say that «in applying a vague, standardless penalty and then referring this case to the Board to resolve, Facebook seeks to avoid its responsibilities».[5] In its findings, the body stressed the lack of provision for an «indefinite suspension» sanction in the platform's terms and conditions, which renders that restriction on freedom of expression vague and uncertain, possibly violating the prohibition of arbitrariness. In a nutshell, META's Oversight Board, if it were a judicial body, took the view that the social network's decision had violated the *rule of law*, namely, but not exclusively,

[1] On January 8, 2021, former President Trump tweeted the following: "*The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!*". Shortly afterwards, Donald Trump also tweeted this: "*To all of those who have asked, I will not be going to the Inauguration on January 20th*". See the blog posted by Twitter on January 8, 2021. Available in https://blog.x.com/en_us/topics/company/2020/suspension.

[2] See above.

[3] See the META's Oversight Board Case Decision 2021-001-FB-FBR. Available in https://www.oversightboard.com/decision/fb-691qamhj/.

[4] See above.

[5] META's Oversight Board Case Decision 2021-001-FB-FBR.

the legality principle (in the sense of *nullum crimen, nulla poena sine lege*[6]) and the prohibition of arbitrariness, both essential elements of the *rule of law* principle (Dias 2019). As a result, Facebook revised its initial decision and ordered the suspension of Donald Trump's account for a period of two years. Meanwhile, in January 2023, the suspension was lifted. Ironically, the announcement of the end of the suspension was accompanied by a statement in which META claimed that, as a general rule, it does not seek to hinder public and democratic debate, especially in the electoral context, the more so because the public should be able to hear what politicians have to say, which includes the «good, the bad and the ugly» so that they can make informed choices (Clegg 2023).

More curious and significant, however, is the social network's statement from 21 January 2021, when it referred to the Oversight Board the decision to 'deplatform' Donald Trump:

> Every day, Facebook makes decisions about whether content is harmful, and these decisions are made according to Community Standards we have developed over many years. It would be better if these decisions were made according to frameworks agreed by democratically accountable lawmakers. But in the absence of such laws, there are decisions that we cannot duck. (Clegg 2021)

In its statement, META appears to agree that private companies and tech giants should not make decisions that significantly impact the public sphere, particularly regarding content moderation. META wisely adds that it would be better if decisions on content moderation were made according to rules adopted by democratically elected legislators accountable to citizens. However, in META's vision at the time of those comments, no public laws regulate and restrict the content moderation activity carried out by digital platforms. Meanwhile, perhaps responding to the implicit invitation laid out by the digital platform in 2021, the European Union adopted the Digital Services Act (DSA),[7] intending to ensure a safe, predictable, and trustworthy online environment that facilitates innovation and in which fundamental rights enshrined in the Charter of Fundamental Rights of the European Union are effectively protected.[8]

This chapter explores the DSA as a regulatory step by the European Union towards a *digital rule of law* in the context of the emergence and consolidation of "digital constitutionalism". The chapter proceeds as follows: Sect. 2 explores the notion of digital constitutionalism and its articulation with the *rule of law*. Section 3 delves into an overview of the DSA and how it is based on a "platform realism" logic that moves from liability to responsibility, due care, risk management, and transparency. Finally, Sect. 4 argues that one of the most critical contributions of the DSA is the

[6] The *rule of law* principle implies*, inter alia*, that strict limits must be set on the arbitrary and excessive actions of power, to uphold citizens' rights and freedoms. Thus, in a bid to prevent arbitrariness and excess, the exercise of power must be strictly subject to a legality principle, the essential content of which is, in this context, the idea that there can be no negative consequence in a citizen's legal sphere that is not based on a prior, written, strict and certain rule.

[7] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) PE/30/2022/REV/1, *OJ L 277, 27.10.2022, p. 1–102*.

[8] Article 1(1) DSA.

mitigation of arbitrariness of digital platforms in the relations established with users, which is a fundamental feature of the *rule of law* applied in the digital realm. We then present some examples that show how the obligations laid down in the DSA effectively implement some of the principles of the *digital rule of law* framework in the European digital ecosystem. We conclude that the DSA is a legal instrument that affirms the *digital rule of law* in the European Union.

2 The *Digital Rule of Law* and 'Digital Constitutionalism'

Over the last 20 years, the Information Age has become a Digital Age in the context of an algorithmic society, dependent on and driven by algorithms—an "algocracy", i.e., «a particular kind of governance system, one which is organized and structured on the basis of computer-programmed algorithms» (Danaher 2016). The algorithmic society is dominated by multinational giants, who manage digital platforms on which citizens are increasingly dependent and who stand between the nation-state and individuals, using algorithms and artificial intelligence as mediating agents to shape public discourse and, to a large extent, human action itself (Celeste 2023). In doing so, "digital giants" de facto govern vast communities of people (Simoncini and Longo 2021), having a «quasi-state status» (Savin 2022). Today, digital platforms, inserted in "digital empires" (Bradford 2023), are actors that create, shape, and amplify the dominant grand narratives of our time. Such platforms are often virtual places without *state* and *law* and, therefore, without the *rule of law*.

Since the end of last century, the allure of the enormous promises of technological development—many of which have come true—has led to neglect and oblivion of the role of constitutionalism, constitutional law, and the *rule of law* in limiting the consolidation of uncontrolled private powers and in the protection of fundamental rights (Gregorio 2022). For a long time, the prevailing discourse was essentially optimistic ("cyber-utopianism") and relatively deified of technology, associated with liberal positions or non-intervention by public authorities in the online environment (Morozov 2011). This "constitutional neglect" has allowed the growth and consolidation of massive digital platforms that accumulate powers beyond public supervision and play "quasi-constitutional" roles that compete with traditional public authorities (Bassini and Pollicino 2023). These powers can either be delegated as a result of indirect transfers and conscious dismissals by public authorities in favor of private companies, sometimes due to a lack of technological or financial capacity, sometimes due to political convenience, or can arise autonomously as a result of the very architecture of the network and the market power of these private actors (Gregorio 2021). Although exercised by multinational private companies, the powers in question may frequently be equivalent to legislative, administrative, executive and judicial functions traditionally performed by public authorities.

The powers of the large digital platforms are evident in the context of online content moderation activities. According to Article 3(t) DSA, content moderation refers to the activities, whether automated or not, undertaken by digital platforms that

are aimed at detecting, identifying, and addressing "illegal content" or information incompatible with terms and conditions, including measures taken that affect the availability, visibility, and accessibility of that "illegal content" or that information, such as demotion, demonetization, disabling of access to, or removal thereof, or that affect the ability of users to provide that information, such as the termination or suspension of a user's account. Let us be clear: freedom of expression is a core feature of any democratic state under the *rule of law*, as the European Court of Human Rights (ECHR) has consistently recognized in its decisions. ECHR considers freedom of speech as «one of the essential foundations of such [democratic] society, one of the basic conditions for its progress and for the development of every man».[9] Regarding the possibilities that the digital environment poses to freedom of expression, the Court stated in the landmark case *Delfi v. Estonia* (Kaur 2023) the following:

> […] the Internet provides an unprecedented platform for the exercise of freedom of expression. […] However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.[10]

Guaranteeing the conditions upon which it is possible to exercise one's freedom of expression is among the main tasks that citizens in liberal democracies endow to legislators, governments, and courts, all bound by the *rule of law*. There is no reason for the digital realm to be any different, even though the private sector's role in the digital age appears pervasive. In fact, «the contemporary exercise of freedom of opinion and expression owes much of its strength to private industry, which wields enormous power over digital space, acting as a gateway for information and an intermediary for expression» (United Nations 2016). As "gatekeepers",[11] digital platforms can impose numerous restrictions on online freedom of expression in violation of users' fundamental rights. Such tremendous capabilities demand new regulatory approaches and "constitutional counteractions" that adequately address the challenges of the Digital Age (Celeste 2023). Gone are the days of cyberspace demanding to be left alone and rejecting any claim of sovereignty or authority by elected legislators and governments (Barlow 1996). And the promise that a (cyber)world was being created where «anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity» was, at best, disappointing. Cyberspace is not and cannot be a space free of law and (fundamental) rights; emphasizing that citizens enjoy the same rights online as they do offline (United Nations

[9] Decision from the ECHR Handysed v. The United Kingdom [Plenary], n.º 5493/72, § 49, 7 December 1976.

[10] Decision from the ECHR Delfi AS v. Estonia [Grand Chamber], n.º 64569/09, § 110, 16 June 2015.

[11] In EU law, a 'gatekeeper' is an undertaking that has a significant impact on the internal market, provides a core platform service which is an important gateway for business users to reach end users, and enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future. See Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act), PE/17/2022/REV/1, OJ L 265, 12 October 2022, p. 1–66.

2016) is no longer enough, although the constitutional values that need to be upheld do not vary.[12]

The "digital constitutionalism" framework, which has received considerable attention in recent years, allows us to deal with the array of matters posed by the emergence of uncontrolled digital powers and their challenges to fundamental rights and democratic processes, from online speech and platform governance to data protection, non-discrimination, property, cybersecurity, and artificial intelligence (Duarte et al. 2024). As Terzis puts it, digital constitutionalism addresses «the fear that constitutional principles and protections are quickly crumbling under the obscure forces of novel digital technologies and the private entities wielding technological power», being an «umbrella term that seeks to encompass a diverse array of legal instruments and political *desiderata*» (Terzis 2024). The role of digital constitutionalism is not to regulate technology itself but to limit the threats that result from the growth of private, global, and plural (Golia 2023) powers that affect modern democracies, shifting the emphasis from the "empire of government" to the "empire of digital platforms" (Koskenniemi 2013). Notwithstanding the criticism (Terzis 2024; Golia 2023; Costello 2023),[13] digital constitutionalism is both a «form of reaction» and a «normative strategy» to protect fundamental rights and democracies while limiting the emergence of powers outside any public and democratic control or oversight (Gregorio 2022). In doing so, as Sirota observes, digital constitutionalism entails «the empowerment of the state or of supranational entities as the European Union […] to bring commercial actors to heel and so protect individuals» (Sirota 2023). This is no easy task, as digital constitutionalism requires

> consensus about how power over the internet should be shared and limited, how those limits may be imposed, and by whom. Unlike regular constitutions, which just have to articulate how power is shared between different parts of a single government, digital constitutionalism requires us to develop new ways of limiting abuses of power in a complex system that includes many different governments, businesses, and civil society organizations. (Suzor 2019)

Constitutionalism is traditionally understood as a «fundamental set of principles» and the «correlative institutions arrangement» (Sartori 1962) aimed at countering the arbitrary power of the state, ensuring a "limited form of government" (*idem*). This

[12] See Opinion from the Supreme Court of the United States Moody v. NetChoice, LLC, 603/1, 1 July 2024. This case, brought before the US Supreme Court, concerns two statutes adopted in Texas and Florida, which curtail the capacity of large social media companies to engage in content moderation and make those platforms give reasons to a user if they remove or alter the uploaded content. In its Opinion, the Court found that the curation and content moderation activity of social media networks, insofar as it results in an «expressive product», is protected by the First Amendment. Albeit expressing sympathy for those who believe that «modern media empires» had gained ever greater capacity to «shape» and even «manipulate popular opinion», going as far as affirming that digital platforms «unabashedly control the content that will appear to users, exercising authority to remove, label or demote messages they disfavor», the Court asserts that government cannot interfere with «editorial choices—say, by ordering the excluded to be included», even when the government invokes an interest «in improving, or better balancing, the marketplace of ideas», despite the importance of having a «well-functioning sphere of expression, in which citizens have access to information from many sources».

[13] For a detailed account of the critiques regarding digital constitutionalism.

«negative» understanding of constitutionalism (Barber 2015) highlights the need for a defense mechanism against the interference of public powers and authorities vested with the so-called *ius imperium.* But constitutionalism does more than watch against oppression. On the «positive» side, constitutionalism requires from the state a set of «effective and powerful institutions» that can act in order to achieve its primary purpose: «advance the well-being» of the community (*idem*). Constitutionalism, to advance the public interest, instructs politicians to adopt measures to protect and promote fundamental rights, which they do even in horizontal relations between private individuals, as is the case of the Portuguese Constitution[14] and some provisions of the Charter of Fundamental Rights of the European Union (Prechal 2020; Brkan 2019), as the Court of Justice of the European Union (CJEU) decided.[15]

According to Zürn, «the exercise of power includes all instances in which an actor A brings an actor B to think or do something they would not thought or done otherwise» (Zürn 2018). In its nature, power isn't exclusive to the state. Indeed, in an algorithmic society, the primary sources of threats to fundamental rights and democratic processes are not public authorities but new private actors who govern digital spaces (Duarte et al. 2024). Despite being formally private, these digital spaces are de facto public spaces, corresponding to the new "digital public sphere", which is necessarily more polarized and where professional journalism and traditional mass media are «increasingly bypassed as gatekeepers of public communication» (Seeliger and Sevignani 2022). In these materially public spaces, private actors exercise functions that traditionally belong to public authorities (Belli et al. 2017). When the exercise of these powers that mimic public authority is carried out without constitutional safeguards and controls, we have a problem that concerns us collectively, requiring the intervention of constitutional law and the *rule of law*.

Above all, the *rule of law* principle translates the normative ideal that all public powers are subject to limits derived from the law itself. In a nutshell, the *rule of law* stands for «tempering power» (Krygier 2016). Caunes emphasizes the relationship between law and power by pointing out the following:

> Law, ruling alone, is a force confining and power, unattended, is a flame that burns to its own destruction. The rule of law thus constitutes an anchoring nexus or connecting bond between law and power. It is both channeling and ordering their interrelations. It represents the legal mantle of power in a democratic society. (Caunes 2022)

Undoubtedly, the *rule of law* arose as a defense against the arbitrariness of state power. However, the main problem that the *rule of law* seeks to address is power itself, wherever it may be and regardless of the form in which it is exercised. Thus, if we

[14] Article 18(1).

[15] See Judgment of the CJEU of 17 April 2018, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V. (*Egenberger*), C-414/16, EU:C:2018:257; Judgment of the CJEU of 11 September 2018, IR v JQ (*IR*), C-68/17, EU:C:2018:696; Judgment of the CJEU of 22 January 2019, Cresco Investigation GmbH v Markus Achatzi (*Cresco Investigation*), C-193/17, EU:C:2019:43; Judgment of the CJEU of 6 November 2018, Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn (*Bauer*), C-569/16 and C-570/16, EU:C:2018:871; Judgment of the CJEU of 6 November 2018, Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu (*Max-Planck*), C-684/16, EU:C:2018:874.

recognize that digital platforms, although private, exercise quasi-public functions or mimic the powers of public authorities, it is not unreasonable to demand that their activity be subject to defined constitutional and legal limits, always to protect citizens' fundamental rights and uphold democratic societies. In fact, it's just a matter of applying to the digital realm the idea that «wherever there is power there ought to be constitutional limits» (Maduro 2012), which can be encapsulated in the formula *ubi potestas, ibi constitutione.*

In Tom Bingham's formula, the *rule of law* presupposes that «all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts» (Bingham 2011). It must be acknowledged that digital platforms effectively perform roles or functions that are traditionally public functions. In fact, regarding content moderation, digital platforms often act as legislators by defining the content that can legitimately be shared on their platforms through their terms and conditions. They act as judges, deciding the legitimate content in specific cases and determining the appropriate sanctions. They act as administrative bodies, applying the sanctions they have decided and undertaking activities to detect, identify, and combat illegitimate content (Perel and Elkin-Koren 2016). If we recognize that (public) powers in the modern "agoras" and forums are being handed over to a handful of private digital giants, constitutional mechanisms must be put in place to restrict the exercise of these powers in order to ensure respect for fundamental rights and the *rule of law*. In this sense, «principles such as transparency, accountability, representation, or due process, should be observed *whenever* organised power threatens fundamental rights, irrespective of the power's nature» (Duarte et al. 2024).

Today, intermediary service providers, especially digital platforms, are living in a regulatory paradox, expressing two contradictory concerns regarding content moderation: over or under-blocking or filtering illegal and harmful content. In either case, citizens' fundamental rights are potentially at stake, namely the right to human dignity, freedom of expression, and information, including freedom and pluralism of the media, the right to privacy, the right to data protection, the right to non-discrimination, and children's rights. When moderated excessively, the operation of digital platforms can have significant impacts on freedom of expression and information, often giving rise to the so-called "chilling effect" or "deterrent effect" of freedom of expression and, as Jack Balkin puts it, to problems of «collateral censorship» and «digital prior restraint» (Balkin 2018a, b). When not sufficiently moderated, digital platforms can be a place for online crime, the dissemination of illegal and harmful content, including hate speech, the distribution of child pornography, human trafficking operations, the promotion of terrorism and terrorist recruitment, the amplification of disinformation, the facilitation of internal and external interference operations in democratic processes, and for the manipulation and abuse of users' personal data (De Streel et al. 2020).

In addition to the implications for the fundamental rights of citizens, Ekin-Koren and Perel argue that content moderation efforts carried out by intermediary service providers, namely digital platforms, entail four major challenges for the *rule of law* principle (Elkin-Koren and Perel 2020): they mitigate the distinction between

private interests and public responsibilities; they delegate the power to make normative choices about the legitimacy of content to opaque algorithms; they circumvent the constitutional safeguard of the separation of powers; and they undermine the constitutional guarantees of *due process* and *fair trial*.

Taking a closer look at each of these sources of concern:

2.1 Mitigation of the Distinction between Private Interests and Public Responsibilities

According to Ekin-Koren and Perel, digital platforms are in a dual position as private companies and as facilitators or intermediaries of civic discourse in the public sphere (Elkin-Koren and Perel 2020). These two roles are not always reconcilable: on the one hand, as commercial players, digital platforms seek to maximize their profits and satisfy their financial interests in all the activities they perform, including content moderation. From a business model viewpoint, it is convenient for online platforms, often self-described as "communities", to proclaim themselves as champions of freedom, diversity, and openness insofar as that message builds and sustains trust for their users to keep seeing, creating, uploading, reacting, or sharing content in the network: the "attention economy" demands it.

Practically since their birth, and especially in the European Union with the e-Commerce Directive,[16] digital platforms have benefited from a safe harbor privilege and a conditional exemption from liability for content uploaded and shared by users (Spindler 2017). This conditional exemption from liability originally had a twofold purpose: to empower technological companies in the early days of their development by not burdening them economically with the costs of responsibility for third-party content and, on the other hand, to be an effective way of protecting citizens' fundamental rights, namely against interventions that could excessively restrict freedom of expression, opinion, and information, causing unintended censorship or deterrent effects (Gregorio 2022). However, the role of platforms in the digital economy has evolved and is no longer strictly passive or neutral.[17] In fact, while increasing the number of users and exploiting the "attention market", digital platforms started to intervene algorithmically in prioritizing and recommending content (Weitzenboeck 2023), placing themselves not precisely as arbiters of truth but certainly as arbiters of visibility. Thus, in addition to private and commercial interests, digital platforms have also come to govern the public discourse of their users, but with questionable and contestable criteria or without paying full attention to the public interest and responsibilities behind that task. Therefore, digital platforms are consequently

[16] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *OJ L 178, 17.7.2000, p. 1–16*.

[17] See Judgment of the CJEU of 12 July 2011, L'Oréal SA et al. v eBay International AG et al. (*L'Oréal*), C-324/09, ECLI:EU:C:2011:474.

hostage to a conflict of interests: they must moderate those who sustain their business model or, as Ekin-Koren and Perel put it, «guard against those who potentially tend their garden» (Elkin-Koren and Perel 2020).

Albeit this conflict, one of the requirements at the heart of the *rule of law*, within the framework of the legality principle, is that private entities performing public functions should be subject to the *rule of law* and can be held accountable in terms comparable to public entities. As the Venice Commission asserts:

> […] individual human rights are affected not only by the authorities of the State, but also by hybrid (State-private) actors and private entities which perform tasks that were formerly the domain of State authorities, or include unilateral decisions affecting a great number of people, as well as by international and supranational organisations. The Commission recommended that the Rule of Law principles be applied in these areas as well. § The Rule of Law must be applied at all levels of public power. *Mutatis mutandis*, the principles of the Rule of Law also apply in private law relations. (European Commission for Democracy Through Law (Venice Commission) 2016)

2.2 *Delegating the Power to Make Normative Choices about the Legitimacy of Content to Opaque Algorithms*

Whether we like it or not, online content moderation activities involve normative and frontier choices, especially regarding harmful content not considered illegal ("lawful but awful"), as with disinformation. Even regarding illegal content, content moderation requires applying and interpreting legal provisions that often give rise to doubts and interpretative issues. The use of automated content filtering processes frequently contributes to the violation of users' fundamental rights and freedoms. It transforms the inherent human nature of normative, judicial, and executive functions (Frosio 2023), potentially leading to the arbitrariness that the *rule of law* principle seeks to avoid.

2.3 *Bypassing the Constitutional Safeguard of the Separation of Powers*

Traditionally, the substantive criteria of what does or does not constitute legitimate, protected, or unprotected speech are set out in the law, and decisions adopted based on those laws are subject to judicial scrutiny as part of effective judicial protection. However, the content moderation decisions adopted by digital platforms are not, as a rule, subject to traditional control mechanisms, especially since these private actors are not necessarily obliged to respect fundamental rights, given the lack of horizontal effect of these provisions. Democratic regimes have taken advantage of this state of affairs to enlist, co-opt, or cooperate with private actors to restrict or limit citizens' freedom of expression in the face of constitutional guarantees and the *rule of law* (Elkin-Koren and Perel 2020).

2.4 Undermining the Constitutional Guarantees of Due Process and Fair Trial

Due process and *fair trial* presuppose that all defendants have the right, for example, to an independent and impartial court of law, that they can present their arguments and evidence on an equal footing ('equality of arms'), and that they can receive a duly reasoned and appealable decision (Monsen and Willumat 2024). Pasquale explains that *due process* rights, "while flexible, should include four core features in all but the most trivial or routine cases: the ability to explain one's case, a judgment by a human decisionmaker, an explanation for that judgment, and an ability to appeal" (Pasquale 2021).

However, the content moderation mechanisms on digital platforms are far from complying with these standards. If the platform itself decides on the content it stores and displays, independence and impartiality are not guaranteed, especially since decisions can be automated and obscure, without human intervention, rarely reasoned, adopted without prior contradiction, and not subject to review by an independent and disinterested body. On the other hand, using automated and algorithmic mechanisms in decision-making and balancing the interests and fundamental rights at stake raises serious concerns about transparency, accountability, and the contestability of decisions (Elkin-Koren and Perel 2020).

3 The Digital Services Act and "Platform Realism"

As we are witnessing at an increasing pace (Rogero 2024),[18] intermediary services operations, namely online platforms, raise a significant number of ethical, political, economic, legal, and societal challenges «due to their reach, in particular as expressed in the number of recipients of the service, in facilitating public debate, economic transactions and the dissemination to the public of information, opinions and ideas and in influencing how recipients obtain and communicate information online».[19] There is no doubt that the activities of online platforms, especially the large ones, are prone to impact fundamental rights protected by the Charter of Fundamental Rights of the European Union, mainly freedom of expression and information, freedom to

[18] Among other possible examples, see the recent decision of the Brazilian Supreme Court to suspend X in Brazil following the failure of the platform to appoint a legal representative in the country.

In response to the court's decision, Elon Musk, X's owner, launched a public crusade against the judge of the case, not only revealing the court proceedings subject to secrecy but also adding that "the people of Brazil have a choice to make—democracy, or Alexandre de Moraes". See: https://x.com/GlobalAffairs/status/1824819053061669244.

[19] Recital 75 DSA.

conduct a business, the right to non-discrimination, and the attainment of a high level of consumer protection.[20]

Recognizing the transformative power of digital technologies both in terms of opportunities and dangers, the European Commission set out in February 2020 its ambition to create a «Europe Fit for the digital age» (European Commission 2020), focusing on three overarching objectives: technology that works for people, a fair and competitive economy, and an open, democratic and sustainable society. In this context, the Commission announced that, in the last quarter of that year, it would propose a Digital Services Act Package to implement *ex ante* risk-based rules designed to guarantee fair and contestable markets in the digital sector and review the liability regime of intermediary services laid down in the e-Commerce Directive from 2000, reinforcing the «oversight over platforms' content policies in the EU» (*idem*).

The step to present a horizontal legislative framework for digital services in the European Union follows the introduction of several «sector-specific legislative and soft law instruments» (Schwemer 2023), like the revision of the Audiovisual Media Services Directive,[21] the Directive on Copyright in the Digital Single Market,[22] the Regulation on promoting fairness and transparency for business users of online intermediation services,[23] the Regulation on addressing the dissemination of terrorist content online,[24] the European Union (EU) Code of Conduct on Countering Illegal Hate Speech Online,[25] and the Code of Practice on Disinformation (strengthened in 2022 and integrated into the DSA in 2025).[26] Despite these EU regulatory interventions, and in the same period, some Member States (e.g., Germany, Austria, and France) have not shied away from adopting or considering adopting legislative measures to contain the growing power of digital platforms in areas non-harmonized by EU law (e.g., illegal content and online disinformation) (Pitruzzella and Pollicino

[20] Recital 3 DSA.

[21] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. PE/33/2018/REV/1. *OJ L 303, 28.11.2018, p. 69–92.*

[22] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. PE/51/2019/REV/1. *OJ L 130, 17.5.2019, p. 92–125.*

[23] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services. PE/56/2019/REV/1. *OJ L 186, 11.7.2019, p. 57–79.*

[24] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online. PE/19/2021/INIT. *OJ L 172, 17.5.2021, p. 79–109.*

[25] Available in: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en.

[26] Available in: https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation.

2020). The risk that diverging national laws would negatively affect the digital single market was one of the reasons that led to the adoption of the DSA.[27]

As service intermediaries have grown out of their infancy, the dominant strategy of the beginning of the century, based on a shield against liability for third-party content and the absence of a general obligation to patrol platforms aimed at promoting the growth and development of the internet and lowering compliance costs (Kosseff 2019), has ceased to stand up to scrutiny. As Savin points out, from 2015 onwards, we have witnessed a «change in values or attitudes» in the EU regarding intermediaries, from non-liability to responsibility and minimalism and non-intervention to care and duty (Savin 2022). This change of heart was immediately apparent in the Commission's announcement of the Digital Services Act Package, given that one of the key actions was the adoption of «new and revised rules deepen the Internal Market for Digital Services, by increasing and harmonizing the responsibilities of online platforms and information service providers» (European Commission 2020).

Proposed by the European Commission in December 2020 and passed by the European Parliament and the Council in a record time (less than two years), the DSA, in conjunction with the Digital Markets Act (DMA), is a «paradigmatic example showing the shift of paradigm in the Union towards more accountability of online platforms to protect European democratic values» (Duarte et al. 2024), seeking to «foster responsible and diligent behavior by providers of intermediary services to ensure a safe online environment, which allows Union citizens and other parties to freely exercise their fundamental rights» (European Commission 2020b). Adopted on 19 October 2022, the DSA took full effect on 17 February 2024,[28] allowing the European Commission to designate the Very Large Online Platforms (VLOP) and Very Large Search Engines (VLOSE) under Article 33 DSA—Zalando, Wikipedia, XVideos, Temu, X, TikTok, Stripchat, Snapchat, Pinterest, XNXX, Bing, Instagram, Facebook, LinkedIn, Shein, YouTube, Google Shopping, Google Maps, Google Play, Google Search, Booking.com, Pornhub, App Store, Amazon Store, and AliExpress.[29]

The DSA, which has already been said to be a "digital constitution"[30] or a "digital civil charter" (Husovec 2023) for the EU, «can be seen as a milestone» in the path to European digital constitutionalism based on transparency and accountability in line with European values (Gregorio 2022). Although the constitutional aura associated with the new regulation can be disputed (Wilman 2022), the truth is that the DSA is a significant effort to regulate digital services, or, more correctly, intermediary services ('mere conduits' (infrastructures), temporary storage services ('cashing'), and 'hosting services', including online platforms and social networks), i.e., «services that involve the transmission and storage of user-generated content» (*idem*).

[27] Recital 2 DSA.

[28] Article 93(2) DSA.

[29] Updated list of VLOP and VLOSE designated by the European Commission under DSA available in: https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses.

[30] The Greens/EFA in the European Parliament (2022) European Parliament Votes on Constitution for the Internet. Press Release. Available in: https://www.greens-efa.eu/en/article/press/european-parliament-votes-on-constitution-for-the-internet.

The DSA aims to provide a safe, predictable, and trusted online environment that facilitates innovation and where users' fundamental rights are respected (Article 1(1) DSA). To this end, a «second generation» (Husovec 2023) of harmonized rules that apply horizontally and «asymmetrically» (Savin 2022) to intermediary services are adopted, signaling a shift away from sector-specific regulation. In fact, the DSA intends to be a general legal instrument without prejudice to other legal acts adopted by the EU that also apply to intermediary service providers, namely those listed in Article 2(4) DSA. Twenty years later, the DSA replaced the e-Commerce Directive regarding the liability regime for intermediary service providers. Notwithstanding, the e-Commerce Directive will remain in force as it has a broader scope of application, apart from the rules on the liability of intermediary service providers, which have been transferred to the DSA's Chapter II.

Regarding intermediary services provider's liability, the DSA maintains the fundamental framework of conditional exemption from liability (the «negligence-based model» (Turillazzi et al. 2022) laid down in the e-Commerce Directive. However, it introduces some surgical changes to adapt the rules following technological developments and the CJEU case law on the matter (Schwemer 2023). To protect citizens' fundamental rights against over-blocking and to avoid placing excessive burdens on intermediary service providers, the DSA also maintains the ban on Member States introducing obligations to patrol or police user-generated content (Article 8 DSA). However, innovatively, a so-called "Good Samaritan principle" is introduced for non-neutral roles played by intermediaries: they can now proactively adopt voluntary patrolling actions and take measures on illegal content without this affecting their exemption from liability, provided they adopt these measures (detecting, identifying and removing, or disabling access to, illegal content) in good faith and diligently (Article 7 DSA). The use of vague concepts in this context is to be criticized (Schwemer 2023), despite the attempt at clarification in recitals, which specifies that the condition of acting in good faith and in a diligent manner «should include acting in an objective, non-discriminatory and proportionate manner, with due regard to the rights and legitimate interests of all parties involved, and providing the necessary safeguards against unjustified removal of legal content».[31]

From another angle, the DSA also standardizes the minimum procedural rules and the obligations of intermediaries in the context of decisions by judicial and administrative authorities against illegal content (Article 9 DSA). Notably, and perhaps explaining the relative speed with which the Act was adopted, the Regulation does not define what constitutes illegal content, leaving that task mainly to national legislation and EU law (Article 3(h) DSA). In other words, the DSA does not provide an autonomous legal basis for decisions on illegal content, which must be found in different national or European laws.

Given that the DSA does not imply a rupture with the liability regime provided by the e-Commerce Directive, some might assume this is not a cutting-edge regulation. However, the new regime's main feature is the focus shift from liability to platform diligence, accountability, and transparency in two main pillars: content moderation

[31] Recital 26 DSA.

and risk management. According to Frosio, the DSA «attempts to govern these widespread private ordering practices via their constitutionalization, regulation and institutional governance» (Frosio 2023). It does so not by intervening on the boundaries of what is considered to be illegal or harmful content (regarding 'lawful but awful' content, it is still up to the platform, when drawing up their terms and conditions, to decide what user-generated content may or not circulate), but rather by introducing substantive and, most importantly, procedural safeguards that "constitutionalize" and harmonize the content moderation practices around the EU, protecting users fundamental rights as laid down in the Charter of Fundamental Rights of the European Union (Frosio and Geiger 2023). In this regard, Pollicino goes so far as to say that the DSA (alongside the DMA) represents a "second season" for European digital constitutionalism, marked by a move towards «procedural digital constitutionalism» (Pollicino 2023). As we later show, this procedural dimension of digital constitutionalism is anchored in the *digital rule of law* and the *digital due process.*

In the digital age, as Fisher would say (Fisher 2009), it is easier to imagine the end of the world than to imagine the end of digital platforms, which calls for a sort of "platform realism". Given that the existence of some immunities from liability related to third-party content is a prerequisite for the viability and flourishing of intermediary services as we know them, the 'realistic' regulatory option in the DSA was to decouple liability from an array of substantive and procedural rules aimed at solving a «wide range of societal problems that emerged» from the platform dominance (Husovec 2023). As stated in Recital 41 DSA «the due diligence obligations are independent from the question of liability of providers of intermediary services which need therefore to be assessed separately», caving in a separate set of rules on sanctions and enforcement (Chapter IV) and cementing the «accountability-but-not-liability» (Husovec 2023) design of the DSA.

These due diligence obligations imposed in the DSA on intermediary service providers are structured in proportion to the type and size of the intermediary and the nature of the service provided[32] in a sort of regulatory pyramid with four cumulative levels of obligations (Husovec and Laguna 2022): (a) universal, applying to all intermediary service providers; (b) basic, applying only to hosting services; (c) advanced, applying only to online platforms, including social networks; (d) special, applying only to VLOP and VLOSE, as summarized in Table 1[33]:

The special obligations to VLOP and VLOSE focus, as said, on systemic risk management stemming from the design, functioning, and use of platforms. The basic idea behind these additional obligations is 'the bigger the power, the bigger the responsibility'. As large online platforms and search engines can «strongly influence safety online, the shaping of public opinion and discourse, as well as online trade»,[34] they must periodically assess the systemic risk deriving from their activities in areas

[32] Recital 41 DSA.

[33] Inspired by Husovec, M. and Laguna, I. R. (2022).

[34] Recital 79 DSA.

Table 1 DSA's due diligence and transparency obligations

Type of obligation—cumulative	Type of service	Size of the service	Obligations under the DSA
Universal obligations (L1)	**Providers of intermediary services**	All sizes	• Designation of a single point of contact—Art. 11 and 12; • Obligations regarding terms and conditions—Art. 14; • Making publicly available annual transparency reports related to content moderation (except micro or small enterprises)—Art. 15
Basic obligations (L2)	**Hosting services**	All sizes	• Implement notice and action mechanisms—Art. 16; • Provide a statement of reasons—Art. 17; • Notification of suspicious of criminal offenses—Art. 18
Advanced obligations (L3)	**Online platforms**	All sizes except micro or small enterprises that aren't VLOP	• Creation of an internal complaint-handling system—Art. 20; • Making available out-of-court dispute settlement—Art. 21; • Give priority to trusted flaggers notifications—Art. 22; • Adopt measures and protection against misuse—Art. 23; • Making publicly available annual transparency reports—Art. 24; • Obligations and prohibitions regarding online interface design and organization—Art. 25; • Obligations related to advertising on online platforms—Art. 26; • Obligations concerning recommender systems transparency—Art. 27; • Adopt measures to ensure the online protection of minors—Art. 28

(continued)

Table 1 (continued)

Type of obligation—cumulative	Type of service	Size of the service	Obligations under the DSA
Special obligations (L4)	**Very large online platforms and very large online search engines**	Online platforms that have a number of average monthly active users equal to or higher than 45 million	• Risk assessment—Art. 34; • Put in place mitigation measures to the specific systemic risks identified—Art. 35; • Take concrete actions in the context of a crisis response mechanism—Art. 36; • Promote independent annual audits—Art. 37; • Give an opt-out option for recommender systems based on profiling—Art. 38; • Addition online advertising transparency obligations—Art. 39; • Provide access to data—Art. 40; • Establish a compliance function ('Chief compliance officer')—Art. 41; • Making publicly available semesterly transparency reports—Art. 42; • Pay a supervisory fee—Art. 43

such as the dissemination of illegal content, and the impact on fundamental rights, democracy, civic discourse, electoral processes, public security, gender relations, public health, minors, and physical and mental well-being (Article 34 DSA). They must not only assess the risks but also take concrete, reasonable, proportionate, and effective measures to mitigate the identified risks (Article 35 DSA). The approach of the DSA to societal risks does not rely on a substantive scheme, where public authorities dictate to digital platforms the 'does and don'ts', instead demanding platforms to identify the potential risks and come up with the solutions to address them better, always protecting users. Suppose an argument can be made that digital platforms are the "architects" of modern public spaces (Gillespie 2018). In that case, it is only correct to demand that when planning, building, and maintaining those spaces, intermediary service providers intervene when needed to ensure that online tools' societal benefits greatly surpass the harms.

4 Digital Services Act: Towards the *Digital Rule of Law*

All things considered, we tend to believe that one of the most critical contributions of the DSA is to reduce the discretion and arbitrariness of digital platforms' behavior in the relations established with users and citizens. Indeed, surrounding the exercise of power with guarantees against discretion and arbitrary action is one of the key features of the *rule of law* that should be extended to the digital realm. As Suzor argues:

> The rule of law requires that decisions of those who have power over us are made according to law, defined in opposition to the arbitrary or capricious exercise of human discretion. The values of the rule of law—consent, predictability, and procedural fairness—are core liberal values of good governance. (Suzor 2018).

When we refer to the *digital rule of law* in the context of digital constitutionalism, we refer to the application and (where necessary) adaptation of the traditional *rule of law* rulebook to the digital environment. The Council of Europe Venice Commission has contributed enormously to the densification of the *rule of law,* which can be considered a multifaceted principle. Departing from Tom Bingham formula, the Venice Commission finds that the *rule of law* «is accepted as a fundamental ingredient of any democratic society» (European Commission for Democracy Through Law (Venice Commission) 2011), and a consensus can be found for a set of elements of the *rule of law* «which are not only formal but also substantial or material» (*idem*). The six elements or ingredients that make the *rule of law* principle are as follows:

- Legality (supremacy of the law);
- Legal certainty;
- Prohibition of arbitrariness;
- Access to justice before independent and impartial courts;
- Respect for human rights;
- Non-discrimination and equality before the law.

The definition and the list of elements promoted by the Venice Commission have an advantage linked to the interdependence between the *rule of law*, democracy, and the promotion of fundamental rights.[35] Thus, the *digital rule of law*, in addition to limiting the powers of private actors in the digital sphere, placing them under the aegis of the law, and making their decisions and actions subject to control, also leads to the promotion of democracy and respect for fundamental rights. These aspects

[35] Such interdependence is also a feature of the definition of the *rule of law* in EU legal system. Indeed, the *rule of law* «refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU». Article 2(a) of the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. *OJ L 433I, 22.12.2020, p. 1–10.*

(the *rule of law*, protection of democracy, and respect for fundamental rights) are all present throughout the DSA, leading us to believe that the new Regulation is a legal instrument that affirms the *digital rule of law* in the European Union.

We can now point out three examples of how the obligations laid down in the DSA effectively implement some of the principles of the *digital rule of law* framework in the European digital ecosystem:

4.1 Terms and Conditions

Terms and conditions are the 'constitutions' of digital platforms governing the contractual relationship between the provider of intermediary services and the users.[36] Derived from private law, terms and conditions are unilaterally defined, modified, and imposed on users in an arbitrary, obscure, 'take it or leave it' logic (Suzor 2018). Terms and conditions are a fundamental element of power distribution in digital platforms, often tipping the balance disproportionately in favor of digital platforms and their commercial interests.

Against this background, the DSA introduces procedural obligations for all providers of intermediary services when drafting, modifying, and implementing their terms and conditions. The Regulation does not interfere with the substantive content of platforms' terms and conditions, which is left to the contractual liberty of the parties. However, in applying the *rule of law* elements, Article 14(1) DSA requires that intermediaries include in their terms and conditions all «policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system».

This provision materializes the *rule of law* in its legal certainty dimension. This element presupposes that the texts in which rules are laid down are easily accessible. Moreover, legal certainty entails a duty to respect and apply the existing regulations in a foreseeable and consistent manner. Foreseeability demands the rules are proclaimed in advance, have predictable effects, and are formulated with sufficient precision and clarity to enable individuals to regulate their conduct (European Commission for Democracy Through Law (Venice Commission) 2011). On the other hand, the principles of *nullem crimen sine lege* and *nulla poena sine lege* are also part of the *rule of law* (Article 49 of the Charter of Fundamental Rights of the European Union).

In this context, the DSA demands from digital platforms the *ex ante* or previous definition of the users' rules of conduct, the sanctions ('restrictions') they may impose, and the procedure leading to the decision on those sanctions. For the benefit of clarity and precision, terms and conditions should be set out in «clear, plain,

[36] Article 3(u) DSA.

intelligible, user-friendly and unambiguous language, and shall be publicly available in an easily accessible» format (Article 14(1) DSA). Against long and unreadable texts, VLOP and VLOSE are also obligated to provide users with a «concise, easily-accessible and machine-readable summary of the terms and conditions, including the available remedies and redress mechanisms, in clear and unambiguous language» (Article 14(5) DSA). Albeit digital platforms maintain their rule-making power, they are now «indirectly constrained by the limits placed on the procedure» (Husovec 2023); they are prevented from having hidden rules, retroactively changing their policies, or applying restrictions that have no basis in preexisting rules. Indeed, digital platforms are now obligated to inform users of «any significant change» to terms and conditions (Article 14(2) DSA).

In addition, Article 14(4) DSA seems to impose on intermediaries the effective enforcement, in a diligent, objective, and proportionate manner, of their terms and conditions, always respecting the rights and legitimate interests of the parties involved, including fundamental rights of users. Legal certainty and supremacy of the law, both elements of the *rule of law*, imply that rules are implemented in practice and don't just live in the books.

Also steaming from the *rule of law* is the prohibition of an arbitrary and discriminatory application of the existing rules, which is likewise banned for digital platforms. Given the platforms' obligation to respect fundamental rights and apply their terms and conditions in an equal and non-discriminatory fashion, they are prevented from treating differently users who break the same rules, depending, for example, on their visibility or other criteria of opportunity.

4.2 Notice and Action Mechanisms and Statement of Reasons

The conditional exemption liability regime for hosting services provided in the e-Commerce Directive and transferred to the DSA is based on the 'notice and takedown' model. Insofar as a hosting service obtains knowledge of any legal activity or illegal content, it must act expeditiously to remove or disable access to said content (Article 6(1) and Article 16(3) DSA).

Without changing this paradigm, the DSA introduces harmonized procedural rules regarding the reception and treatment by providers of hosting services of notifications on illegal content, especially the notice formal requisites. Article 16(6) DSA stipulates that providers of hosting services shall process all (not just some) notifications they receive and make their decisions promptly, diligently, non-arbitrarily, and objectively. Given that it prohibits arbitrariness, these norms materialize the *rule of law* principle. According to the Venice Commission, unfair, unreasonable, irrational, or oppressive decisions are inconsistent with the *rule of law* (European Commission for Democracy Through Law (Venice Commission) 2011). By requiring that any notification is handled in a timely, non-arbitrary, and objective manner, the DSA imposes on digital platforms the rationalization of their decisions regarding content

moderation, which cannot be discretionary but based on existing and enforceable policies with respect for equality and non-discrimination.

Article 16(5) and Article 17 DSA establish a basic procedural duty of notification of the platforms' decision to the person who submits the claim, and the person affected by it. If the platform's decision on content moderation gives rise to a restrictive measure (removal, disabling access, demotion, suspension, termination, or restriction of the service or monetary payments), Article 17(1) DSA imposes an obligation on hosting services providers to give reasons for their content moderation decisions to the affected users. The statement of reasons must indicate the (a) restrictive measures adopted and, where relevant, its scope of application and duration, (b) the facts and circumstances in which the decision was based, (c) the information on the use made of automated means in taking the decision, (d) the legal or contractual ground on which the content is prohibited, (e) the information on the possibilities for redress available to user, in particular, where applicable through internal complaint-handling mechanisms, out-of-court dispute settlement and judicial redress (Article 17(3) DSA). The statement of reasons imposed by the DSA is, after all, very similar to the rationale that a public authority's decision, including a judicial one, must include under the *rule of law* and *due process*. Under the DSA's new rules, platforms' decisions on content moderation that adversely affect users cannot be based on secret and obscure criteria; instead, to legitimize them, they must be transparent and explainable using clear and prior criteria. From the point of view of the *rule of law*, this is about respect for fundamental rights, particularly procedural rights. As referred by Pasquale, however flexible, *due process* must include the explanation of the decision that adversely affects an individual in all cases (Pasquale 2021).

The *rule of law* also implies fundamental rights such as the right of access to justice and the right to an effective remedy (Article 47 of the Charter of Fundamental Rights of the European Union). Considering this framework, the DSA imposes on digital platforms the duty to inform users negatively affected by content moderation decisions on their rights on internal, extrajudicial (Article 21 DSA), or judicial redress. As a result, digital platforms cease to have the final word on content moderation decisions, which can be reviewed.

4.3 Internal Complaint-Handling System

Finally, and closely related to the previous topic, Article 20 DSA imposes on online platforms (excluding micro and small enterprises) the provision of an internal complaint-handling system. For a minimum period of six months, users have the opportunity to lodge complaints against decisions that have been adopted in the context of content moderation (suppression, blocking, or restriction of visibility of content; suspension or termination of the provision of the service; suspension or termination of accounts; suspension, termination or restriction of the ability to monetize content).

Symmetrically to Article 16(6), Article 20 DSA also stipulates that online platforms handle complaints in a timely, non-discriminatory, diligent, and non-arbitrary manner. The online platform may uphold or revoke its decision. However, if the complaint contains sufficient grounds for the online platform to consider that its decision not to act upon the notice is unfounded or that the information to which the complaint relates is not illegal and is not incompatible with its terms and conditions or contains information indicating that the complainant's conduct does not warrant the measure taken, it shall reverse it without undue delay (Article 20(4) DSA). In any case, the provider must inform the complainant of the decision and give reasons, also explaining the remedies available (Article 20(5) DSA). Lastly, Article 20(6) DSA imposes on online platform providers the human oversight of the complaints decision process.

From the viewpoint of the *rule of law*, these rules are, as explained, features related to the prohibition of arbitrariness and the respect for fundamental rights, such as procedural rights, the right of access to justice, and the right to an effective remedy. Suzor explains: «As minimally applied to governance by platforms, we might expect due process to have two main components. First, that before a regulatory decision is made, it is made according to valid criteria and processes. Second, once a decision has been made, due process then requires that users who are adversely affected have some avenue of appeal and independent review» (Suzor 2018). As demonstrated, the DSA accomplishes both components.

5 Conclusion

In the digital age, the activities of online platforms raise a significant number of societal challenges that require solutions. These challenges go to the heart of liberal democracies' features, threatening their flourishing. The internet's unique characteristics («lack of editorial approval, low barriers of entry (including omnipresent zero cost of service), incredible speed and scale of distribution, broad social and geographical inclusiveness, and resilience of communications» (Husovec 2023)) exacerbate the problems. Legislators everywhere act as funambulists, trying to articulate competing interests to better protect citizens' fundamental rights and the workings of democracies.

In the European Union, the DSA marks a critical turning point in the ongoing struggle to create a more transparent, accountable, and rights-respecting digital landscape. In a world where online platforms wield unprecedented influence, the DSA offers a regulatory framework that tempers this power, aligning it with the *rule of law* principles. Cyberspace is not and cannot be a space free of (fundamental) rights and the *rule of law.* We must apply to the digital realm the idea that constitutional limits follow power wherever it may be (*ubi potestas, ibi constitutione*).

There is an argument to be made that the primary function of the DSA is to fight against platforms' discretion and arbitrariness, a struggle that is an inherent

feature of the *rule of law* principle. «By enlisting online intermediaries as watchdogs, governments would de facto delegate online enforcement to algorithmic tools» (Frosio 2023), which, in return, requires strong procedural safeguards introduced by the DSA. Even if digital platforms are not liable for illegitimate content their users post, they must still be held accountable for content moderation (Elkin-Koren and Perel 2020) through the *digital rule of law*. The DSA ends the «fragmented» and discretionary voluntary remedies provided by online platforms (Gregorio 2022), introducing a set of harmonized, horizontal, and asymmetric obligations related to content moderation and risk management.

The *rule of law*, protection of democracy, and respect for fundamental rights are all present throughout the DSA, leading us to believe that the new Regulation is a legal instrument that affirms the *digital rule of law* in the European Union. The DSA is a cornerstone in the EU's effort to ascertain the *digital rule of law* and the *digital due process*. It places vital constraints on digital platform operations while reinforcing the values of democracy, transparency, and the protection of fundamental rights through the *digital rule of law*. Although the DSA may not resolve every challenge posed by the digital age, it is a bold step toward ensuring that the *rule of law*, long the guardian of unchecked power, is upheld in the online sphere. As digital platforms evolve, so must the frameworks that regulate them. The DSA is a strong foundation upon which to build a more accountable and transparent digital future.

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