

## **Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?**

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**Abstract:** From a cursory look at the terms of service of the main social networking websites, it is immediately possible to detect that Facebook's show a peculiar configuration. Although they represent a mere contract between private parties, these terms adopt the traditional jargon of constitutional texts, and articulate their contents in terms of rights, principles, and duties. This curious pairing between norms regulating social media and the constitutional sphere is also apparent in a series of non-binding documents that are unequivocally named 'bill of rights', and seek to articulate a set of principles to protect social media users. This paper examines whether the emergence of a constitutional tone in this limited number of texts could be related to the effective, or aspirational, constitutional function that these documents exercise. The identification of a series of significant shortcomings will lead to exclude that social media's terms of service and bills of rights of social media users currently play a constitutionalising role. Nevertheless, the possibility to theoretically justify the use of these documents as mechanisms of constitutionalisation in the social media environment will be adduced as an evidence of the potential constitutional aspirations of these texts.

**Keywords:** Social media's terms of service, Internet bills of rights, digital constitutionalism.

*'More than 175 million people use Facebook. If it were a country, it would be the sixth most populated country in the world. Our terms aren't just a document that protect our rights; it's the governing document for how the service is used by everyone across the world.'*

Zuckerberg in Zittrain 2009

### **1. Introduction**

Almost a decade ago, Mark Zuckerberg compared Facebook to a populated country (Zuckerberg in J Zittrain 2009). Today, a similar association would no longer be valid: in 2017 the number of active Facebook's users surpassed 2 billion (Statista 2018), going well beyond the number of inhabitants of the most populated countries in the world (see, e.g., National Bureau of Statistics of China 2018). Nevertheless, one has the impression that these new figures even reinforce the validity of this metaphor of Facebook as a big state: an entity with its own territory, the platform; its own population, the users; and of course its own law, the terms of service.

In the words of Zuckerberg, as quoted above, one can perceive a rhetoric tone used to talk about the platform's terms of service. From a legal point of view, these terms are merely a contract between

private actors; nevertheless, one has the impression that Facebook's CEO wants to present them as the fundamental law protecting users' rights universally. Admittedly, one has a similar feeling by directly reading Facebook's terms, or, more precisely, its 'Statement of Rights and Responsibilities' (Facebook 2018a). In fact, they list a decalogue of 'rights' and 'freedoms', and refer to Facebook's Principles, a document in which the expression 'you', i.e. the users, is even replaced with the more generic denominations 'People' and 'Every Person' (Facebook 2018b).

Moreover, this peculiar pairing of norms regulating social media and the constitutional sphere does not seem to be an isolated occurrence. This is also apparent in a series of recently emerged documents that are unequivocally named: 'Bill of Rights for Users of the Social Web' (Smarr et al. 2007), 'Social Network Users' Bill of Rights' (Pincus 2010), 'Bills of Privacy Rights for Social Network Users' (Electronic Frontier Foundation 2010), and 'Bill of Rights for Social Network Users' (Ello 2015). These texts, which this paper will generally call bills of rights of social media users, do not have any binding legal value, simply being the output of single individuals, or non-governmental organisations. However, their content aims to articulate a series of rights of social media users and obligations of social media platforms in a way that clearly echoes traditional constitutional instruments.

In light of this phenomenon, one could cynically consider the adoption of, what this paper calls, a 'constitutional tone' by these documents as a mere 'legal talisman' (Albert 2016), a way of legitimising the arbitrariness of social media's governance, or even a simple instrument of marketing, taking advantage of the common positive preconceptions linked to the idea of constitution (Herrman 2017). Or, conversely, one could think that it rather reflects the fact that these texts effectively play, or wish to play, a constitutional function in the social media environment.

It would be eventually possible to discover that this constitutional tone is in reality generated by a mixture of these reasons. However, fully disentangling this knot is certainly beyond the possibilities of a legal investigation. The scope of this paper will be more limited. In particular, it will consider whether these documents represent, or wish to represent, mechanisms of constitutionalisation in the social media environment.

This paper will be structured in the following way. The second section will illustrate, in detail, the phenomenon of the adoption of a constitutional tone in Facebook's terms of service and in the bills of rights of social media users.

The third section will tackle the question of whether social media's terms of service and the bills of rights of social media users represent mechanisms of constitutionalisation in the social media environment. This investigation will build on the existing scholarship which analysed private actors' self-regulation (Suzor 2016a; Mayer-Schönberger and Crowley 2006; Teubner 2012) and the bills of rights of social media users (Gill, Redeker, and Gasser 2015; Yilma 2017) from a constitutional perspective. In line with this literature, it will be argued that both instruments could theoretically perform the quintessential constitutional functions of protecting fundamental rights and balancing the powers involved. However, it will be shown that a series of shortcomings undermines the ability of these documents to concretely act as effective mechanisms of constitutionalisation.

Lastly, the fourth section will explain why a potential process of constitutionalisation relying on social media's terms of service and bills of rights of social media users could nonetheless be envisaged in the future. To this end, this paper will draw on the set of theories generally known under the name of 'global constitutionalism', and, in particular, it will adapt Anne Peters's conception of 'compensatory constitutionalism' (Peters 2006) to the context of social media's constitutionalisation. It will be contended that these documents could be regarded as compensatory counteractions to the failure of state-centric constitutional instruments to provide an answer to the challenges of the social media environment. In this way, this paper will argue that the adoption of a constitutional tone could reflect the aspirations of these documents to embody such a compensatory trend.

## 2. The adoption of a constitutional tone

With the expression ‘constitutional tone’, this paper refers to the use of the traditional jargon of constitutional texts, and to the adoption of the peculiar configuration that articulates contents in terms of rights, principles and duties. The emergence of a constitutional tone in documents related to the social media environment represents a limited phenomenon. At the moment, it appears that only Facebook’s terms of service, among the main social networking websites, and four bills of rights of social media users possess such a characteristic. However, no evidence allows us to exclude such a phenomenon, as it can be observed today, as representing the beginning of new slowly rising trend.

### 2.1 Facebook’s terms of service

From a cursory look at the terms of service of the main social networking websites,<sup>1</sup> it is immediately possible to detect that Facebook’s show a peculiar configuration. Facebook is the only social networking website that denominates its terms as the ‘Statement of Rights and Responsibilities’ (Facebook 2018a), an expression that echoes the national constitutional dimension in which rights and responsibilities of citizens are established.

At the outset of the document, Facebook declares that the Statement ‘derives from the Facebook Principles’. The latter represents a separate document in which Facebook condenses ten principles that should guide its actions towards its ultimate goal, namely ‘to make the world more open and transparent’ (Facebook 2018b). Facebook’s decalogue is quite comprehensive, and includes:

- a) a series of freedoms: to share information, to connect online, to access information, to build trust and reputation; and
- b) a series of people’s rights: to own their information, to set privacy control, to have practical tools to share and access information, to be equally treated on Facebook, not to be removed from Facebook, to have open platforms and standards, to have free access to Facebook, to have rights and responsibilities written in a separate statement, to have rights and responsibilities consistent with Facebook Principles, to participate in the redaction of the Principles or of the Statement, to have a unique Facebook service open to everyone worldwide.

The Statement addresses its rules to ‘you’ or ‘we’, as in the terms of service of the other analysed social networks, while, as anticipated in the introduction, the Principles address more generally ‘Every Person’ or the ‘People’, as if certain norms were established for the world in its universality, and regardless of the use of Facebook as a medium of communication (see Facebook 2018b, especially the First principle).

Moreover, in conformity with Facebook’s ninth Principle, any amendments to the terms of service will be subject to the review and comment of the users (Facebook 2018b, Article 13.1). Historically, Facebook went even further: in 2009 the company of Menlo Park announced, for the first time, to give its users the opportunity not only to comment, but also to vote for the set of terms they preferred. At that time, indeed, the section of the Statement on amendments provided that

If more than 7,000 users comment on the proposed change, we will also give you the opportunity to participate in a vote in which you will be provided alternatives. The vote shall be binding on us if more than 30% of all active registered users as of the date of the notice vote. (Zittrain 2009)

In conclusion, contrasting to those of other social networking websites, Facebook’s terms do not appear as a mere contract between private parties; conversely, it is possible to perceive Facebook’s

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<sup>1</sup> Facebook, Google+, Instagram, LinkedIn, Pinterest, Snapchat, Tumblr, Twitter, YouTube have been taken into account as a representative example of the main social networking websites.

willingness to give a constitutional tone to its terms. This is evident if one considers both the form and the content of Facebook's terms. From a formal point of view, Facebook frees its terms from the characteristic verbiage of private agreements to adopt the traditional jargon of constitutional law. From a substantive point of view, Facebook adapts traditional constitutional principles, such as freedom of expression or the right to privacy and data protection, to the context of its platform. Last, but not least, it suggests an idea of 'democracy-ness' by allowing users to participate in the process of definition of the terms.

## **2.2 Bills of rights of social media users**

In a working paper of the Berkman Center for Internet and Society published in November 2015, Lex Gill, Dennis Redeker, and Urs Gasser identified four documents seeking to establish a 'bill of rights' for the social media environment: namely, the 'Bill of Rights for Users of the Social Web' published in 2007 by Joseph Smarr et al. ([https://www.template.org/?page\\_id=599](https://www.template.org/?page_id=599)), the 'Social Network Users' Bill of Rights' posted in 2010 by Jon Pincus ([http://www.talesfromthe.net/jon/?page\\_id=3017](http://www.talesfromthe.net/jon/?page_id=3017)), the 'Bills of Privacy Rights for Social Network Users' proposed in 2010 by the Electronic Frontier Foundation (<https://www.eff.org/deeplinks/2010/05/bill-privacy-rights-social-network-users>), and the 'Bill of Rights for Social Network Users' promoted in 2015 by the social network Ello (<https://bill-of-rights.ello.co>).

These documents do not have any legal value; they were simply published in the last ten years by individuals or by non-governmental organisations. In a similar way to Facebook's Statement of Rights and Responsibilities, they adopt a jargon which is unequivocally associated with the constitutional dimension; for instance, all four texts are entitled 'bill of rights'. These texts do not seek to articulate a general list of constitutional principles, but they are issue-specific (Gill et al. 2015). As is evident from their title, their scope of application is limited to the social media environment, and in particular, they focus on the dimension of the social media users.

Such a limited scope of application from a material and personal point of view also influences the content of these documents. According to Gill et al. 'the rights articulated by such documents tend to be thematically in line with what Todd Davies has described as "user data freedoms"' (2015: 12). Davies derived ten principles, each one articulated in different freedoms and rights, from an empirical analysis of several proposals of 'users' bills of rights' (2014). Lastly, at a substantive level, they not only establish a series of rights from the perspective of users, but, in parallel, also tend to impose obligations on private platforms.

In conclusion, the bills of rights of social media users manifestly present a constitutional tone. They both embrace the traditional terminology of constitutional texts, and configure their content in terms of rights, principles, and duties.

## **3. New mechanisms of constitutionalisation?**

In this paper, the concept of 'constitutionalisation' designates the 'process of the emergence, creation, and identification of constitution-like elements' within a given legal order (Peters 2006: 582). This notion has been employed in several areas of law, with special attention accorded in recent years in the fields of EU law, and international law (Weiler and Wind 2003; Peters 2006).

Notoriously, the definitions of 'constitution' are multifarious. This paper has adopted the one that Anne Peters defines as 'legitimist', and considers the narrowest (Peters 2006: 585). This notion of constitution echoes the text of Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789, which states that '[a]ny society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution' (Conseil constitutionnel 2018). Therefore,

according to this interpretation, the notion of constitution is defined by its two quintessential functions, namely, the protection of fundamental rights and the balancing of powers.

Therefore, in order to shed light on the constitutional nature of these documents, this section examines, in turn, the extent to which social media's bills of rights and bills of rights of social media users are able to perform the two quintessential constitutional functions of protecting fundamental rights and balancing the powers of the actors involved. Relying on the scholarship which studied these documents from a constitutional perspective, it will be contended that both the terms of service and the bills of rights could theoretically represent mechanisms of constitutionalisation in the social media environment. Nevertheless, it will be shown that a series of potential shortcomings undermines the chances of these documents to concretely act as such. In this way, this section will demonstrate that the adoption of a constitutional tone is not determined by a constitutional function that the terms of service and the bills of rights effectively play in the social media environment.

### **3.1 Social media's terms of service as a means of self-constraint**

In a recent paper focusing on the governance of online platforms, Nicolas Suzor argued that social media's terms of service in fact regulate the distribution of power 'like constitutional documents', even if, from a formal point of view, they are merely contracts between private parties (2016a: 3).

The identification of the balancing of powers as the main constitutional function performed by the rules of specific subsystems of the digital environment is confirmed by other scholars. In particular, Viktor Mayer-Schönberger and John Crowley detected a phenomenon of constitutionalisation in the adoption of 'voluntarily constraining norms in virtual spaces through norms of a real-world jurisdiction' (2006: 1809). These scholars defined the decision of Linden Lab to recognise real intellectual property rights in its users' creations as a 'constitutional moment' (2006: 1809). A key constitutional element was found in the willingness of the virtual world software to '[constrain] its future behaviour through its own decision' (2006: 1809).

Drawing a parallel with virtual world software, these observations allow us to confirm and further specify the qualification of social media's terms of service as a potential mechanism of constitutionalisation. Indeed, it is possible to understand that these documents represent the output of a dominant actor, such as private companies are in the social media environment, and that, therefore, they conceptually denote an operation of self-constraint, which is typical of political constitutions (Teubner 2012).

The constitutional function of the self-regulation of a dominant actor is also confirmed by Gunther Teubner in the context of specialised transnational regimes (2012). He argued that transnational organisations, such as ICANN and the WTO, are emerging as competing dominant actors beside the state. For this reason, these entities would tend to '[develop] the properties of a collective actor that is similar to the state' (2012: 67), including establishing their own constitution.

In conclusion, social media's terms of service could theoretically perform a constitutional function. In fact, by limiting the possibilities of action of social media companies, they could be regarded as the instrument of self-regulation of a dominant actor in the social media environment.

#### *3.1.1 Implications*

Undoubtedly, the use of social media's terms of service as a mechanism of constitutionalisation appears to be a promising solution if regarded in terms of its operability. Social media's terms of service are an instrument already in place, which is legally binding on the parties involved, and that can be easily adapted to serve this new constitutional purpose. However, at the same time, a series of

issues undermines the functionality of the terms of service as a new mechanism of constitutionalisation.

*a) Democratic issues*

Firstly, it is important to heed the admonishment made by Mayer-Schönberger and Crowley in their analysis of constitutionalisation of virtual worlds: ‘Linden Lab provided a constitutional moment, not a democratic one’ (2006: 1809). Constitutionalisation by private companies’ self-constraint is not a synonym of democratisation. Facebook’s attitude in relation to the possibility to amend its terms is exemplary in this context: in 2009, Facebook felt the need to increase democratic participation in its governance by offering its users the possibility to vote on its new terms of service (Zittrain 2009), but today, as the Statement shows, this power is no longer offered. From this example, it is possible to understand that a constitutionalisation through social media’s self-constraint does not automatically imply a fully democratic governance, and, consequently, still exposes users to the arbitrariness of social media’s choice. In such a way, these actors retain the possibility to tighten and loosen their constraint as often as they please, and without any control from their users (Suzor 2016b).

*b) Intrinsic bias*

Secondly, constitutionalisation through social media’s self-constraint does not effectively guarantee a fair balance of powers. Suzor argues that social media’s terms of service often grant power to the platforms, without nevertheless limiting it (2016a). It is evident here that the problem lies in the fact that social media companies are, at the same time, the authors and the subjects of their own rules. This is again the old Platonic issue of who guards the guardians: any attempt of balancing these powers would be intrinsically biased in favour of social media platforms, and subject to their potential review.

*c) Limited protection*

Thirdly, constitutionalisation through social media’s self-constraint could only partially ensure the quintessential constitutional function of protecting fundamental rights. In fact, the terms of service can guarantee fundamental rights only by limiting the power of social media companies. This implies that the exercise of fundamental rights based on specific terms of service is restricted to the field of action of a single social media company, and that it cannot be *directly* protected against potential violations of other actors involved in the social media context. For example, the terms of service could only *indirectly* delimit the extent to which advertisers, the main source of revenue in the social media market, can legally use users’ personal data in order to achieve their profit. However, as recent scandals have shown (Cadwalladr and Graham-Harrison 2018), such an indirect protection against potential rights violations perpetrated by the advertisers could prove to be insufficient.

*d) Legal talisman*

Fourthly, constitutionalisation through social media’s self-constraint can be fake: a mere constitutional façade. This could happen when traditional notions of constitutional law are transplanted without any effort of translation or clarification in a sphere dominated by private companies, where states are no longer the primary holders of constitutional obligations (Berman 2000). In this way, the transplanted notions risk representing what Kendra Albert calls a ‘legal talisman’ (2016): a way of legitimising the arbitrariness of social media’s governance, or even a simple instrument of marketing, taking advantage of the common positive preconceptions linked to the idea of constitution (Herrman 2017).

### *e) Constitutional collisions*

Lastly, constitutionalisation through social media's self-constraint can lead to the development of a set of constitutional norms potentially conflicting with nation-states' constitutions. Teubner already foresaw the risk of constitutional 'collisions' as an inevitable consequence of the constitutionalisation of specialised transnational regimes (2012: 151). The case of U.S. President Donald Trump's attitude of blocking followers on Twitter can be exemplary. Trump tweets from his personal account in relation to matters linked to his official function as president. According to Twitter's terms of service, he is entitled to block his followers, thus preventing them to receive the information he publishes. In this way, it is clear how the rules established by Twitter enter into conflict with people's right to freedom of expression, enshrined in most national and supranational instruments. Indeed, by allowing Trump to block some of his users, Twitter could be accused of restricting the possibility of these individuals to receive information related to the political life of their country. This circumstance becomes even more serious if one thinks that some of the blocked users are journalists, generally considered as the 'watchdogs of democracy'.

In light of these shortcomings, Suzor advanced the proposal to use the principles of the rule of law as a parameter to test the legitimacy of the norms created by social media (2016b; Korff and Brown 2012). He argued that a form of governance which is decentralised at the level of social media platforms could be necessary, but that, at the same time, the notions of state-centric constitutionalism could not be merely transplanted within the new context of social media. Will nation-state legislation be able to instil the rule of law in social media norms or will a different instrument be necessary? A full answer to this question cannot be provided in this paper. However, the next section will analyse the bills of rights of social media users, instruments that, by privileging the position of users vis-à-vis social media companies, could theoretically be conceived to this purpose as a complementary constitutional instrument.

### **3.2 The bills of rights of social media users as an expression of digital constitutionalism**

In contrast to social media's terms of service, no interpretative effort is required to understand that the bills of rights of social media users could be regarded, from a theoretical point of view, as mechanisms of constitutionalisation in the social media environment. The original aim of these documents is indeed to establish the rights of the social media users (Gill et al. 2015).

The working paper authored by Gill et al., in which the bills of rights of social media users were first mentioned, focused on 'digital constitutionalism' (2015). They proposed this denomination 'as a common term to connect a constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet' (2015: 2). At first sight, one could think that the bills of rights of social media users were included in the category of initiatives analysed by the Harvard scholars. However, Gill et al. explicitly excluded these texts from their data set because '[t]hese documents are concerned with the exercise and limits on private power in virtual communities and private social networks, in the spirit of what Nicolas Suzor also called "digital constitutionalism"' (2015: 12).

Suzor, in his doctoral thesis, used the notion of 'digital constitutionalism', first introduced by Brian Fitzgerald (2000), to frame the issue of the regulation of powers in virtual communities (2010: 13). As highlighted by Kinfe Micheal Yilma (2017), the interpretations of the notion of 'digital constitutionalism' provided by Suzor, on the one hand, and Gill et al., on the other hand, are diametrically opposed: the first one applies the concept of constitutionalism only to the context of *private* powers, while the second ones maintain the traditional meaning of this notion as delimitation of '*state's* power over its citizens' (2015: 2, emphasis added). Yilma himself implicitly overtook this distinction by including in his mapping of initiatives of digital constitutionalism also the bills of rights of social media users (2017: 123).

It is the opinion of the Author that the concept of digital constitutionalism, intended as a ‘mind-set’ of ideas whose ultimate aim is the protection of fundamental rights and the balancing of powers in the digital environment (Milewicz et al. 2010), is not restricted to the limitation of state power. It is impossible to neglect that the whole digital environment has recently witnessed the emergence of private companies as a dominant power beside nation-states (Teubner 2012). Since it seems logical to contend that all powerful actors require an action of limitation, the notion of digital constitutionalism should include the limitation of both state and non-state actors.

In conclusion, beyond the single interpretations that are admissible in such a debate, all the existing positions acknowledge that the bills of rights of social media users are also aimed at limiting the power of social media companies, and, therefore, at performing a function of balancing powers.

### *3.2.1 Implications*

The main strength of a mechanism of constitutionalisation through social media’s self-constraint undoubtedly lies in its immediate operability; this solution adapts an already existing legal instrument, the terms of service, to limit the power of a dominant actor of the digital environment. However, at the same time, this option is undermined by a series of shortcomings. In particular, social media platforms, ultimately being private corporations, could not ensure a fully democratic participation in the design of the constitutional rules, and, consequently, strike a fair balance of the powers involved.

In light of these considerations, the bills of rights of social media users could appear as a solution, in principle, ensuring more democratic participation, and diminishing the risk of bias. Nevertheless, also the operability of these potential mechanisms of constitutionalisation is impaired by a series of shortcomings.

#### *a) Rights inflation*

Yilma presented a series of criticisms in relation to the Internet bills of rights that are also valid in the social media context (2017). Firstly, he underlined a risk of rights inflation: he argued that there is no evidence that the existing constitutional machinery does not protect human rights, and he consequently questioned the desirability of other bills of rights (Jørgensen 2013; De Hert and Kloza 2012). It is possible to generally agree with this statement, but it is important to make two clarifications. First, as Yilma himself recognises, the Internet bills of rights, and in particular, as we have seen, the bills of rights of social media users, include *new* rights, the so-called ‘user data freedoms’, deriving from a re-specification in the context of social media of general principles of state-centric constitutionalism. Therefore, it does not appear to be fully appropriate to talk about rights ‘inflation’ in so far as an element of novelty is present. Second, it is worth remembering that the existing constitutional machinery is state-centred; consequently, fundamental rights of the users can be protected only at the condition that legal jurisdiction is established on the concerned social media company, and, in any case, only within specific physical boundaries. This implies a fragmentation of constitutional protection, and the impossibility to cover the full transnational dimension in which social media companies operate.

#### *b) Fragmentation*

Secondly, and here it is possible to fully agree with Yilma, this mechanism of constitutionalisation produces a fragmented and uncoordinated output, characterised by different overlapping proposals. For instance, it is true that each of the examples of bills of rights of social media users listed above, at least, does not cover a single social network; however, it is difficult to appreciate the relationships among them, if any.



### *c) Low normative impact*

Thirdly, Yilma suggested a problem of feasibility: he contended that these bills were proposed in developed Western countries, where new rights can more easily penetrate than in developing countries, which might present greater resistance in integrating these new principles. In reality, it is possible to read this circumstance in a different way. On the one hand, one could claim that there is an issue of democracy: since the existing bills of rights of social media users originated in developed Western countries, people from developing nations were underrepresented in the constituent phase. Consequently, this would lead to impose on the second group a series of principles essentially established by the first group. On the other hand, one could interpret ‘feasibility’ in the sense of ‘normative impact’. Admittedly, this is an issue tangentially mentioned by Yilma at the outset of his paper: these documents of bills of rights are not legally binding texts. They represent a very weak mechanism of constitutionalisation: not only do they arise to protect the interests of the weakest actors, the users, but they also cannot rely on the power of dominant actors, like states and social media platforms, to ensure their application and enforcement (Jørgensen 2013; De Minico 2015).

In conclusion, even if they could theoretically represent an answer to the shortcomings of social media’s self-regulation, the operability of the bills of rights for social media users as mechanisms of constitutionalisation is weakened by a series of significant problems.

## **4. Constitutional aspirations?**

The previous section has shown that a series of significant shortcomings undermines the possibility to regard social media’s terms of service and the bills of rights of social media users as new mechanisms of constitutionalisation in the social media environment. In this way, it has been excluded that these documents adopted a constitutional tone because they effectively exercise a constitutional function in such a context.

This section will examine whether such a constitutional tone could be rather related to the fact that these texts *aspire* to act as mechanisms of constitutionalisation in the social media environment. A positive answer to this question will be given by arguing that the emergence of a process of constitutionalisation, relying on terms of service and bills of rights, could be theoretically envisaged and justified in the social media environment. The adoption of a global constitutionalist perspective will allow to identify a series of elements of the social media environment that subvert the constitutional equilibrium and generate constitutional counteractions both in a state-centric dimension as well as beyond the state. However, it will be shown that certain characteristics of the social media environment restrict the possibility of state-centric constitutional instruments to produce their own counteractions. In light of this phenomenon, it will be contended that the configuration of terms of service and bills of rights as new mechanisms of constitutionalisation in the social media environment could be justified by the necessity to compensate the failure of state-centric constitutional instruments in addressing the challenges of the social media environment.

### **4.1 The advent of social media as a genesis of constitutional counteractions**

Global constitutionalism is a theory, or better, a composite set of theoretical ‘strands’, rotating around a central idea (Peters 2015; Schwöbel 2011). This idea is that a constitutional narrative composed of values such as the rule of law, the protection of fundamental rights, the balance of powers as well as a series of institutions or mechanisms to support these values can be detected beyond the dimension of nation-states, i.e. at global level (O’Donoghue 2014). This theory has been originally developed to reinterpret the treaties of some international organisations, such the EU (Peters 2001; Pernice 2009) or the WTO (Cass 2005; Petersmann 2011), as their ‘constitutions’. Subsequently, it has been used

as the departing point leading to variegated visions of the phenomenon of constitutionalisation beyond the state as well as to different research approaches or schools (Wiener et al. 2012; Deplano 2013).

Interestingly, this theory was recently adopted to also explain certain phenomena related to the Internet. Gunther Teubner argued that the Internet is an environment where the contemporary processes of globalisation and privatisation are challenging the state-centric constitutional framework (2012). Consequently, alternative processes of constitutionalisation are emerging beyond the state through private actors' self-regulation (2012). Moreover, according to Teubner, these new forms of constitutionalisation could not succeed if they did not generalise and re-specify constitutional notions originating in the state-centric dimension by taking in account the peculiarities of the new transnational social environment (2004).

Anne-Claire Jamart claimed that key themes of global constitutionalism, such as the recognition of individual rights, the limitation of power, and the rejection of inter-governmental control are identifiable in the recent development of Internet principles and in the consolidation of the concept of Internet freedom within the Internet governance context (2014). However, she lamented that the absence of an institutionalised framework does not yet ensure satisfying results in relation to the accountability of decision-makers and the enforcement of individual rights (2014).

Ingolf Pernice contended that contemporary global challenges require a global regulatory framework; in this context, the Internet is seen both as the infrastructure that will empower the global community by increasing transparency in decision-making and providing more opportunities of democratic participation, and as an environment requiring itself a constitutional basis (2015). In this way, Internet governance offers a fertile field where 'new forms of non-governmental norm-building processes' can be experimented in the perspective to use them in the future in order to empower people and legitimise global governance mechanisms in a multilevel constitutional context (2015: 8).

Andreas Fischer-Lescano argued that the traditional framework of individual rights provided by international law no longer suffices to face contemporary systemic challenges such as global surveillance (2016). In particular, this approach would fall short of capturing current threats to fundamental rights which are not limited to the relationship between individuals and state actors. Current transnational challenges related to global communications systems would require a constitutional answer transcending 'statist and legal-subjectivist reductionism' (2016: 160).

From a cursory look at this scholarship, it is apparent that certain themes are recurrent in the analysis of the Internet ecosystem from a global constitutionalist perspective: first, the global dimension of the Internet context, which requires regulatory solutions transcending the state-centric dimension; second, the protection of fundamental rights of individuals also against the threats of private actors; and third, the empowerment of the individuals and the simultaneous limitation of powers of the other actors.

Interestingly, all these elements are present in the social media environment as well. Firstly, the social media context is characterised by a global dimension, originally not compartmentalised according to national boundaries (Mueller 2017). Secondly, social media are not only an extraordinary enabler of fundamental rights, in particular of freedom of expression (Jamart 2014; Landemore 2014; Suteu 2015), but also a means used by individuals, private companies, and states to commit illegal acts and threaten these rights (Pelletier 2016; Pollicino 2013; Banks 2010; Nacos 2016; Mitchell et al. 2010). Thirdly, in such an environment, individual users have weak mechanisms to counterbalance the power of the dominating actors, i.e. states, which maintain their traditional ability to intrude on individual fundamental rights (Nixon 2017), social media companies, which have themselves become the legislator and the ultimate arbiter of users' behaviour on their platforms (Jørgensen and Pedersen 2017; Schneier 2013), and all the other private companies, such as advertisers, which exploit users' personal data to pursue their economic interests (Cadwalladr and Graham-Harrison 2018).

These elements show that the advent of social media, by affecting the protection of fundamental rights and the balance of powers, produces an overall alteration of the constitutional relative equilibrium. As in Newton's third law of motion, this general upheaval generates a series of constitutional counteractions aimed at restoring a condition of balance. Taking a global constitutional perspective, the constitutional answer to face the challenges produced by the advent of social media could arise both in a state-centric dimension as well as beyond the state.

#### ***4.2 Terms of service and bills of rights as an expression of compensatory constitutionalism***

The constitutional counteraction developed in the state-centric dimension would consist of the adoption of legal texts belonging to one of the echelons of the pyramid of legal sources; it would primarily take into account the relationship between state and citizens; and it would attempt to regulate social media companies by imposing a state's jurisdiction. An example of this type of instrument could be the recently adopted *Netzwerkdurchsetzungsgesetz*, the German 'Act improving law enforcement on social networks', entered into force on 1<sup>st</sup> October 2017 (Sally 2017). This act imposes on social media companies the duty to remove illegal content from their platforms within specified deadlines (Spindler 2017). Despite the fact that the act has been criticised for contrasting with EU law (Schulz 2017; Spindler 2017), as well as potentially generating dangerous chilling effects to the detriment of freedom of expression (Schulz 2017; Roßmann 2018), the ultimate aim of this legislation would be to ensure that content on social media platforms respects German law, therefore including individual fundamental rights.

However, three characteristics of the social media environment, namely its global dimension, the presence of private actors threatening individual rights, and the emergence of private companies as new dominant power beside states challenge the effectiveness of the constitutional counteractions developed at the state-centric level. Traditional constitutional instruments developed at state level do not have a global scope of application, and focus on the relationship between state and citizens, without fully appreciating the involvement of the powers that operate outside their jurisdiction.

In similar circumstances, 'compensatory' processes of constitutionalisation could emerge beyond the state as an answer to the failure of state-centric constitutional mechanisms (Peters 2006). In this case, there will be no texts belonging to the traditional hierarchy of norms; the relationship between citizens and other actors, such as private companies, would be taken into account; this mechanism would not rely on nation-states apparatuses; and it would have a global reach.

Social media's terms of service and the bills of rights of social media users seem to reflect these characteristics. In this way, a process of constitutionalisation relying on these mechanisms could be envisaged as a counteraction to the failure of state-centric constitutional mechanisms to address the challenges of the social media environment. In particular, the fact that these kinds of documents focus on the relationship between users and social media companies, neglecting that between these actors and the state, could suggest that the traditional state-centred constitutionalism is failing to provide appropriate solutions in relation to this aspect.

Finally, if one compares the characteristics of social media's terms of service and those of the bills of rights of social media users, it seems that the latter could be envisioned as a means to compensate the shortcomings of social media's terms of service in relation to the evident lack of democratic participation and the intrinsic risk of bias. In this sense, the bills of rights of social media users could act as a constitutional counteraction to face the failures of both state-centric constitutionalism and social media's terms of service.

In conclusion, the possibility to envisage and justify the emergence of a process of constitutionalisation, relying on the terms of service and the bills of rights, provides plausibility for the hypothesis that the documents considered at the beginning of this paper aspire to act as

mechanisms of constitutionalisation in the social media environment, and, to this purpose, they adopt a constitutional tone.

## 5. Conclusion

The emergence of a constitutional tone in Facebook's terms of service and in a limited number of texts self-defined as bills of rights of social media users generated the question of whether this phenomenon could be justified as a specific marketing strategy, or it rather reflects an effective, or aspirational, constitutional nature of these documents.

Since a legal inquiry could not completely disentangle the knot of such a dilemma, this paper has limited itself to consider a part of the question, namely whether the social media's terms of service and the bills of rights of social media users play, or wish to play, a function of constitutionalisation in the social media environment.

To this purpose, the paper has structured its analysis in two stages. Firstly, it has been shown that, from a general point of view, the potential use of social media's terms of service and bills of rights of social media users as mechanisms of constitutionalisation in the social media environment, which was envisaged by the scholars who studied these instruments from a constitutional perspective, is in fact undermined by a series of significant shortcomings. In this way, one may exclude the emergence of a constitutional tone among a limited number of texts as originating from an effective constitutional function performed by such documents.

Secondly, it has been observed that a process of constitutionalisation of the social media environment, relying on social media's terms of service and bills of rights of social media users, could be nonetheless theoretically justified, and envisaged in the future. The advent of social media has subverted the constitutional equilibrium by significantly affecting individuals' fundamental rights and altering the balance of powers. In line with the theories of global constitutionalism, it has been argued that the consequent counteractions that state-centric constitutional instruments are able to provide are challenged by the global nature of the social media environment, and by the emergence of private corporations as dominant transnational actors.

In this context, drawing inspiration from Anne Peters' theory of 'compensatory constitutionalism', it has been contended that mechanisms of constitutionalisation beyond the state could emerge to compensate the failure of state-centric constitutional instruments to face the legal challenges generated by the advent of social media. Therefore, the configuration of social media's terms of service and the bills of rights of social media users as mechanisms of constitutionalisation in the social media environment could be envisaged as an expression of this compensatory trend. In this way, the adoption of a constitutional tone could be regarded as symptomatic of the willingness of these documents to play such a compensatory function, and the limited dimension of this phenomenon as an evidence of the embryotic state of this process.

In light of these considerations, future research should monitor the development of constitutional counteractions both at state-centric level, and beyond the state. Only in this way, will it be possible to understand if, in the coming years, state-centric constitutional instruments will be able to effectively protect fundamental rights and balance the existing powers in the global environment of social media, or rather a form of 'multilevel' constitutional governance will emerge (Cottier and Hertig 2003; Pernice 2016; Frosini 2014).

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