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Between Public and Private: Freedom of Speech and Platform Regulation in Europe

Riku NEUVONEN^{*}

The digital disruption of the media and society has changed how citizens participate in public debate and democracy. Today, internet platforms play a significant role in the public sphere. However, their role in the spread of disorders in the public sphere has increased fears about the future of democracy. The main hypothesis of this article is that the regulation of freedom of speech in Europe is fragmented. Therefore, the European Union and individual states are asking social media platforms to monitor their content. A lack of competence in regulating platforms has led to the introduction of various forms of regulation, such as loose co-regulation and the private censorship of content. These new regulations challenge the underlying rationale and justification of the freedom of speech doctrine and principle of the rule of law.

Keywords: freedom of speech, rule of law, platforms, platform regulation, regulation of the internet

1 INTRODUCTION

The last censor of Sweden, Nicholas von Oelreich, was summoned to a meeting of the freedom of print committee of the Swedish Diet between 1765 and 1766. He stressed that placing the responsibility for a publication on printers would prompt many of them to abstain from publishing controversial texts, leading to even less freedom of speech. He set out his argument with the intention of opposing ideas in support of the press freedom that had been emerging in the Diet of 1765.¹

This debate is an example of early discussions about who was responsible for the content of a publication: the author or its printer/publisher, that is, the intermediary.² Across Europe, censors placed this responsibility on the

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¹ Marie-Christine Skuncke, *Tryckfriheten i riksdagen 1760–62 och 1765–66*, 129–132, in *Fritt ord 250 år: tryckfrihet och offentlighet i Sverige och Finland – ett levande arv från 1766*, 109–144 (Bertil Wennberg & Kristina Örtenghed eds, Sveriges riksdag 2016). This book is also available free in English and Finnish.

² Simon Groenveld, *The Mecca of Authors? States Assemblies and Censorship in the Seventeenth-Century Dutch Republic*, in *Too Mighty to Be Free. Censorship and the Press in Britain and the Netherlands* 67–69 (A. C. Duke & C. A. Tamse eds, De Walburg Pers 1987).

printer.³ The Swedish debate ended with the Freedom of the Press Act of 1766 and the abolition of censorship. As a result, a printer was responsible for monitoring content. In addition, the Freedom of Press Act of 1766 had constitutional status and was aimed against arbitrary and administrative censorship.⁴

The main issue was that effective monitoring and regulation of individual content was too hard and expensive for early modern states. It was more efficient to obligate printers to monitor content under the threat of punishment, such as revoking a licence to print. One result was that regulation strengthened the position of printers and decreased competition, as von Oelreich predicted. Similarly, in the seemingly borderless internet, national states and regional actors, such as the EU, have difficulties enforcing laws effectively to control content on the internet. The solution obligates the intermediary to act as monitor and enforcer of the rules. Jack Balkin described this as a new school regulatory approach targeting companies and infrastructure instead of perpetrators.⁵ This approach is similar to the regulation of printers yet is a new approach in internet regulation, one developed further in China and Russia. Following this approach, EU legislation is focusing more on platforms as not only content regulators, but also as enforcers of rules and even laws.

In the European freedom of speech doctrine, the ban on censorship and prior restraint is highlighted, but historically, the idea that regulation must be bound in law has been equally important.⁶ The freedom of speech doctrine and the rule of law principles are intertwined.⁷ This development is highlighted in recent platform regulation in which the EU has introduced new legislation that obligates platforms to monitor content and make assessments of its legality.

My argument is that the regulation of content by platforms jeopardizes the foundations of the principle of the rule of law and fundamentals of the freedom of speech doctrines. The argument is based on two hypotheses. First, freedom of speech regulation in Europe is fragmented because of various jurisdictions and the nature of media regulation. The difficulties of national or even supranational authorities in regulating most content on the internet leads to a shift from public enforcement of laws and constitutional rights to private enforcement of rules by

³ Cyndia Clegg, *Press Censorship in Caroline England 208–232* (Cambridge University Press 1997).

⁴ Riku Neuvonen, *Sananvapauden historia Suomessa* (Gaudeamus 2018).

⁵ Jack Balkin, *Old-School/New-School Speech Regulation*, 127(8) Harv. L. Rev. 2296–2342 (2014).

⁶ Joris van Eijnatten, *In Praise of Moderate Enlightenment: A Taxonomy of Early Moderate Arguments in Favor of Freedom of Expression*, in *Freedom of Speech: The History of an Idea* 32–49 (Elizabeth Powers ed., Bucknell University Press 2011).

⁷ Eric Barendt, *Freedom of Speech* 36–39 (OUP 2005).

self-regulation.⁸ Second, the platform business model contradicts the purposes of regulation, and the current state of platform self-regulation is not acceptable in terms of the rule of law. The business model of platforms is to keep users engaged in their platforms, so moderation is more curation than controlling contents.

In constitutionalism and democracy, the rule of law justifies governance by limiting the competence of the authorities. It is a safeguard against arbitrariness – and even capriciousness – and anchors the legitimacy of governance in legality and democracy.⁹ The rule of law is a framework with which to analyse how the freedom of speech doctrine, the regulation of media and the regulation of the internet have developed. The concepts of platform and content are defined in broad terms because this area is constantly changing.¹⁰ The perspective in the current article comes from regulation and fundamental rights. Therefore, I will not analyse contents that are regulated by competition law, copyright law or several international treaties on contents like child pornography. I must stress that I am not arguing that states and public power have no means to regulate the internet and platforms. Even platform companies are extremely powerful; their actions depend on company law, competition law and the financial system; in other words, companies are legal persons, and as such, their existence and capabilities are dependent on (national) law(s).

I adopt the viewpoint of traditional modern state law with aspects of comparative constitutional law and media law approaches.¹¹ This viewpoint means that my view is based on legality, legal positivism and access to justice in the sense of traditional public law. From this viewpoint, the question is why self-regulation is currently a trend in Europe. I am not arguing that self-regulation or co-regulation are bad or harmful. My argument is that by adopting new regulatory policies and tools in freedom of speech regulation, it is important to understand the consequences for freedom of speech and rule of law. The European freedom of speech doctrine identifies the key elements of the rule of law (and Rechtsstaat), which are the core values of the EU. The present article is part of contemporary research on how constitutional rights and norms are interpreted and applied in the internet environment. There is a debate on digital rights and digital constitutionalism that

⁸ Rikke Frank Jørgensen, *When Private Actors Govern Human Rights*, in *Research Handbook on Human Rights and Internet Technology* 343–363 (Ben Wagner & Matthias C. Kettemann & Kilian Vieth eds, Edward Elgar 2019).

⁹ See Brian Z. Tamanaha, *On the Rule of Law: Histories, Politics, Theory* (Cambridge University Press 2004); Trevor R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OU 2001).

¹⁰ The definition of platforms follows van Dijck definitions. See José van Dijck, *Platform Mechanism*, in *The Platform Society: Public Values in a Connective World* 31–48 (Thomas Poell & Martijn de Waal eds OUP 2018).

¹¹ My viewpoint on modern state law follows the model of Kaarlo Tuori. Kaarlo Tuori, *Properties of Law: Modern Law and After* (Cambridge University Press 2021).

has been going on for the last decade.¹² The current article sheds light on regulation and rule of law principles.

After the introduction, part 2 will demonstrate how the freedom of speech doctrine and rule of law principle are intertwined in Europe. I will demonstrate why contemporary freedom of speech doctrine is fragmented and how this has created a need for new regulation. My argument is that freedom of speech requires the rule of law, the rule of law requires freedom of speech, and both are intended to oppose arbitrariness. However, both concepts are ambivalent and fragmented. Therefore, the convergence of media in platforms is leading to situations in which regulatory power is fragmented among several regulators in the context of platforms.

Part 3 explores how platforms are regulated in the EU, in European case law and at the national level. Current and forthcoming regulatory models are something between co-regulation and self-regulation.¹³ The new legislation is broadening the scope of regulation, which will make platforms the enforcers of the law. For this reason, I demonstrate that the moderation of the platforms is not at a level that is compatible with the requirements of rule of law. Part 4 summarizes the key arguments, indicating how platform regulation could better meet the requirements of the rule of law and freedom of speech doctrine.

2 FREEDOM OF SPEECH AND THE RULE OF LAW IN THE AGE OF THE INTERNET

2.1 THE FREEDOM OF SPEECH DOCTRINE

In trying to understand the need for new kinds of regulation, it is necessary to examine how freedom of speech is fragmented. Freedom of speech is an ambiguous concept. Within Western democracies, it is easy to spot similarities between freedom of speech in the United States and Europe.¹⁴ However, in a more detailed

¹² These two issues are intertwined, but there are two approaches. The first argues that the internet needs its own rules and is developing its own constitution based on these rules. The second approach argues that human rights and constitutional norms of states and supranational actors are getting more and more influence in the internet. Rikke Frank Jørgensen, *An Internet Bill of Rights?*, in *Research Handbook on Governance of Internet* 353–372 (Ian Brown ed., OUP 2013); Edoardo Celeste, *Digital Constitutionalism: A New Systematic Theorisation*, 33 *Int'l Rev. L. Computers & Tech.* 76–99; Nicolas Suzor, *Lawless* (CUP 2019); Matthias Kettemann, *The Normative Order of the Internet* (OUP 2020); Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Bloomsbury 2021); Giovanni de Gregario, *Digital Constitutionalism in Europe – Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022).

¹³ See Rikke Frank Jørgensen & Anja Møller Pedersen, *Online Service Providers as Human Rights Arbiters*, in *The Responsibilities of Online Service Producers* 179–199 (Luciano Floridi & Mariarosaria Taddeo eds, Springer 2017).

¹⁴ Lyombe Eko, *American Exceptionalism, the French Exception, and Digital Media Law* (The Rowman & Littlefield Publishing Group 2013).

analysis, it is difficult to say that the concepts are similar in France and Germany or even in culturally close neighbouring countries such as Finland and Sweden.¹⁵ This has led to fragmentation in terms of how freedom of speech is regulated and defined in treaties and constitutions.

There are certain distinctions in the freedom of speech: freedom of speech as an historical ideology, freedom of speech as a supranational human right, freedom of speech as a national fundamental right, the regulation of freedom of speech in substantial laws and freedom of speech in action. These distinctions demonstrate that freedom of speech and other fundamental rights are multidimensional concepts. These distinctions serve the purpose of comparison, highlighting both theoretical and practical obstacles to enforcing certain regulations.¹⁶

As a historical and philosophical ideology, the freedom of speech ranges from John Milton's *Areopagitica* to contemporary writers. In the book, Milton's target is prior censorship and the licensing of books, which, in his words, is oppressive, arbitrary and tyrannous. Milton argues that ideas should be rejected only after they have been carefully assessed by society and that public debate would distinguish truth from falsehood.¹⁷ In the nineteenth century, John Stuart Mill's influential book *On Liberty* summarizes the key principles of freedom of speech in liberal philosophy.¹⁸ Mill argues for liberty itself and that freedom of speech is key to the freedom to choose one's own way of life. If an individual is ready to face the consequences of exercising their liberty and if doing so does not directly harm others, then society has no right to interfere. He is against arbitrary interference by autocratic governments in the lives and beliefs of their citizens. Indeed, the common elements of most historical and philosophical approaches are in opposition to arbitrary regulation.¹⁹ The Swedish law of 1766 has a similar background but, like similar laws of the era, created new kinds of restrictions by obliging printers to be monitors of content.

As a human right, freedom of speech is based on treaties and recommendations at various levels. The most important treaties at the global level are those of the United Nations (UN): the UN Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (ICCPR; 1976). The

¹⁵ The freedom of speech is a set of values rather than a single theory. Fredrick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press 1982).

¹⁶ Eric Barendt, *Freedom of Expression*, in *The Oxford Handbook of Comparative Constitutional Law* 891–908 (Michel Rosenfeld & Andr s Saj  eds, Oxford University Press 2012).

¹⁷ John Milton, *Areopagitica; A Speech for the Liberty of Unlicensed Printing, to the Parliament of England* in Ernest Sirluck's *Complete Prose Works of John Milton 2: 1643–1648* (Yale University Press 1954).

¹⁸ John Stuart Mill, *On Liberty* (Cosimo 2005, originally Liberal Arts Press 1859).

¹⁹ David Hume & Eugene F. Miller, *Essays, Moral, Political, and Literary* (Liberty Classics 1987). David Hume's essay 'Of the Liberty of the Press' 1742.

UN has several organs to promote and protect the human rights guaranteed in these treaties.

Human rights are also guaranteed at the regional level. The European Convention on Human Rights (ECHR, drafted in 1950) is one of oldest regional treaties, and it is interpreted by the European Court of Human Rights (ECtHR). All members of the European Council are committed to following the rules of the ECHR and practices of the ECtHR. The Inter-American Court of Human Rights interprets the provisions of the American Convention on Human Rights (ACHR). The US and Canada are not members of the ACHR. The third regional human rights body to be mentioned is the African Court on Human and Peoples' Rights, which complements and reinforces the functions of the African Commission on Human and Peoples' Rights. International conventions by the UN; regional human rights treaties in Europe, America, Africa and Asia; and other instruments like the Charter of Fundamental Rights of the European Union (the Charter) constitute the normative framework of human rights at the global and regional levels. The EU Commission is also explicitly making a statement that it will use its market power as leverage to be a global regulator.²⁰ This also includes wider application of EU fundamentals rights, which will intensify the Brussel Effect. In other words, EU rules are increasingly becoming global standards.²¹

The American freedom of speech doctrine is national but also regional and because most of the major platform companies are from the US, so it has strong influence at the global level. In the nineteenth century, the American and European freedom of speech doctrines were similar. This is summarized by William Blackstone in his commentaries, where he writes that speech might be free, but the individual must take responsibility for their actions.²² Contemporary American doctrine was developed at the beginning of the twentieth century and is now more absolute than its European or international counterparts.²³ The First Amendment is literally against the government limiting free speech, and the transition from an early republican view to a more pluralistic view was intertwined with the marketplace of ideas doctrine.²⁴ The American doctrine has set high

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (2007), A Single Market for twenty-first Century Europe.

²¹ Any Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, Oxford 2020).

²² William Blackstone, *Commentaries of the Laws of England* (CreateSpace Independent Publishing Platform 2016).

²³ Stephen M. Feldman, *The History, Philosophy, and Law of Free Expression in the United States: Implications for the Digital Age in Speech and Society in Turbulent Times: Freedom of Expression in Comparative Perspective* (Monroe Price & Nicole Stremlau eds, Cambridge University Press 2018).

²⁴ Frederick Schauer argues that the marketplace metaphor is an argument against government intervention. Schauer, *supra* n. 15, at 33–34.

standards for governmental interference but left private obstacles aside.²⁵ However, the American doctrine makes co-regulation constitutionally impossible.²⁶

As a national fundamental right, freedom of speech is a part of constitutionalism.²⁷ During the change from absolute rule to the rule of law, fundamental rights and freedom of speech were incorporated as constitutional norms. Fundamental rights give citizens a notion of liberty in relation to the state, while the rule of law binds governance to the law. The early freedom of speech legislation, such as in Sweden in 1766, was against administrative censorship or even arbitrary censorship by rulers.

Freedom of speech, as a fundamental right, was the first freedom from censorship by the state.²⁸ A sense of national constitutional identities and doctrines is key in understanding how rights have been interpreted in various countries.²⁹ Understanding the scope of freedom of speech and its concurrence with other fundamental rights is crucial when comparing transnational treaties and national constitutions.³⁰ The idea of concurrence (or compete/conflict) of freedom of speech and other communication-related rights (freedom of art, freedom of assembly, freedom of science and access to information) are the key elements in perceiving the scope of free speech.³¹ The traditional conflict has been between freedom of speech and the right to privacy, but the current situation is more complex because several rights protect the same actions and content. The protection of all constitutional rights means that all constraints and limitations on this protection must be described in the law. The problem is that limitations of freedom of art may differ from limitations of freedom of speech. Freedom of speech, as with other fundamental rights, serves to prohibit regulation based on administrative provisions and arbitrariness.³²

²⁵ Such as The Motion Picture Production Code, Comic Code or The Entertainment Software Rating Board (ESRB). Ira Carmen, *Movies, Censorship, and the Law* (University of Michigan Press 2016); Judd Ethan Ruggill & Ken S. McAllister, *E(SRB) Is for Everyone – Game Ratings and the Practice of Content Evaluation*, in *Video Game Policy* 71–84 (Steven Conway & Jennifer deWinter eds, Routledge 2016). Amy Kiste Nyberg, *Seal of Approval: The History of the Comics Code* (University Press of Mississippi 1998).

²⁶ Also definitions of trusts in US competition law are obstacles for co-regulation. Christopher Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge University Press 2011).

²⁷ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016).

²⁸ Barendt, *supra* n. 7.

²⁹ Adrienne Stone, *The Comparative Constitutional Law of Freedom of Expression*, in *Comparative Constitutional Law* 406–421 (Tom Ginsburg & Rosalind Dixon eds, Edward Elgar 2011).

³⁰ Stephen Gardbaum, *The Structure and Scope of Constitutional Rights*, in *Comparative Constitutional Law* 387–405 (Tom Ginsburg & Rosalind Dixon eds, Edward Elgar 2011).

³¹ For example, in Germany, limitations on freedom of speech do not apply to freedom of art. See the Mephisto decision Bundesverfassungsgericht 24 Feb. 1971 BVerfGE 30 173 (191). See Christoph Spielmann, *Konkurrenz von Grundrechtsnormen* (Nomos 2008).

³² Barendt, *supra* n. 7.

In addition, the horizontal effect (*Drittwirkung*) has been debated in some states, especially Germany. This effect expands the interpretation of human and fundamental rights in situations between two private parties in such a way that states have an obligation to protect the rights of individuals (*Schutzpflichten*).³³ Therefore, the current doctrine of rights is that they are not merely protection against the action of states. The horizontal effect and obligation to protect rights creates various situations and requires more weighing and balancing of competing rights in situations of concurrence or conflict.

The foundations of freedom of speech in Europe are shared, but national developments have created differences between states and constitutional identities. The experiences under totalitarian regimes have also led to the doctrine of the abuse of rights, which is enshrined in the ECHR, the Charter and some national constitutions. The idea here is that human and fundamental rights cannot be used to limit other rights.³⁴ In Europe especially, the so-called ‘Bermuda triangle’ comprised of EU law, the ECHR and national constitutions has created differences in how freedom of speech is implemented.³⁵ Second, various treaties, courts and entities are creating multipolar fundamental/human rights situations (*Mehrpole Rechteverhältnisse*).³⁶ This is more severe in the digital environment because different actors regulate different factors, such as global self-regulation, the domestic regulation of companies, supranational competition regulation, administrative regulation and the limitations laid down in law, both in a company’s home country and in its country of operation. Third, the horizontal effect and obligation to protect rights requires active measures from states. Fourth, the abuse of rights doctrine in the ECHR and EU leaves supranational court options to change the scope of the rights.

2.2 MODERN STATE LAW AND THE RULE OF LAW

The perspective of the current article is modern state law and the principle of rule of law. I have adopted the view that state law is the dominant and most developed type of law and that supranational entities emulate state law.³⁷ Modern state law includes democratic and positive legislatures and an independent judiciary. In other

³³ Utz Schliesky, Christian Hoffmann, Anika D. Luch, Sönke E. Schulz, & Kim Corinna Borchers, *Schutzpflichten und Drittwirkung im Internet. Das Grundgesetz im Digitalen Zeitalter* 140–149 (Nomos 2014).

³⁴ Paulien de Morree, *Rights and Wrongs Under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (Intersentia 2016).

³⁵ Mathias Hong & Nele Matz-Lück, *Grundrechte und Grundfreiheiten im Mehrebenensystem: Konkurrenzen und Interferenzen* (Springer 2012).

³⁶ Rudolf Thienel, *Mehrpole Rechteverhältnisse und Verwaltungsgerichtsbarkeit* (Verlag Österreich 2001).

³⁷ Tuori, *supra* n. 11, at 28–30.

words, the key elements of the Rechtsstaat are the protection of fundamental rights and the rule of law principle. The reason for fragmentation of freedom of speech has been shown to be pluralism of different human rights treaties, concepts of fundamental rights and enforcement of these norms. This same mechanism also affects the rule of law doctrine. The supranational entities like the EU are based on treaties compared with nation states. Therefore, the EU in particular has followed the model of state law, constitutional status of several norms and rule of law principles.³⁸ The nature of this constitutional model is restrictive; both fundamental rights and rules guaranteeing separation of powers restrict the power of the state and set the need for legal justifications for actions.

In the present article, rule of law is based on the core elements expressed in the report by the Venice Commission³⁹: legal certainty, prevention of abuse of powers, equality and access to justice. The rule of law is not the rule by law because in the ruling process; it is required to take into account fundamental rights and other rights and principles. The press laws of early modern states, such as Sweden 1766, were more rule by law, meaning that censorship was possible if it was described in law. The roots of the rule of law and Rechtsstaat are in the nineteenth century and, much like freedom of speech and other rights, stood against unlimited and arbitrary use of power.⁴⁰ However, rule of law is a multi-faceted principle, and its concept depends on the values of who is answering.⁴¹

From a regulatory view, it is important to notice the relationship between public authorities and the rule of law. Jeffrey Jowell has argued that the rule of law has become a link between constitution and administration.⁴² The rule of law is connected to administration and civil servants in ways where administration demonstrates rule of law but is also subordinate to it.⁴³ Therefore, one way to implement rule of law principles in governing is regulation by public authorities. This approach is not common for the Anglo-American approach according, for example, to Albert Venn Dicey, but regulation by public authorities and special

³⁸ Robert Schütze, *From Dual to Cooperative Federalism* 37–40 (Oxford University Press 2009). See also ECJ case C101/08 *Audiolux and Others v. Gruoupe Bruxelles* 2009 ECR I-9823, para. 63. Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015). Tuori points out that the rule of law and German Rechtsstaatlichkeit were especially against arbitrariness, and a key element of these was the protection of an individual's rights. In the context of the EU, the rule of law is a tripartite relationship between the EU, the Member State and individual. The implication is that the rule of law protects individuals from the arbitrariness of both the EU and its Member States.

³⁹ Venice Commission for the Council of Europe. Report on the rule of law – Adopted by the Venice Commission at its eighty-sixth plenary session (CDL-AD (2011)003rev-e, Venice, 25–26 Mar. 2011).

⁴⁰ Erik O. Wennerström, *The Rule of Law and the European Union* 61 (Iustus Förlag 2007).

⁴¹ *Handbook on the Rule of Law* (Christopher May & Adam Winchester eds, Edward Elgar 2018); Tom Bingham, *Rule of Law* (Penguin 2011); Trevor, *supra* n. 9; Tamanaha, *supra* n. 9.

⁴² Jeffrey Jowell, *The Rule of Law Today*, in *The Changing Constitution* 57–78 (Jeffrey Jowell & Oliver Dawn eds, 3d ed. OUP 1994).

⁴³ Joseph Raz, *The Virtue of the Rule of Law*, in *Authority of Law* 210–229 (Joseph Raz ed., OUP 1979).

administrative law and courts are the cornerstones of continental Europe principles, especially Rechtsstaat.⁴⁴

In conclusion, Milton, Mill and other early freedom of speech theorists were against arbitrary regulation, claiming that freedom of speech regulation must be based on laws and have judicial control.⁴⁵ The Swedish freedom of press law of 1766 has a status of constitution. The status of this constitution was not the same as today, but it demonstrates that an aim was to secure freedom of print in a permanent way. At the same time, early constitutionalism strengthened the positivity of law, and both Anglo-American rule of law principles and European Rechtsstaat were seen as constitutional barriers against the misuse of power and arbitrariness. Nowadays, rule of law and freedom of speech are buzzwords with many interpretations. Still, constitutionalism and rule of law principles point out that fundamental rights are efficiently regulated by public authorities. In many legal systems, the delegation of public tasks to privates must be justified by constitutions. At the other end, for example, the Finnish constitution has very strict requirements for delegation, and core state functions, such as the enforcement of laws, might be constitutionally impossible. The EU law allows more flexible delegation of public tasks, and most of the European States are somewhere between. However, Article 49 of the Charter sets principles of legality and proportionality of criminal offences and penalties, which aligns with Article 7 of the ECHR.⁴⁶ Therefore, even if the delegation of public tasks does not violate the constitutional norms of some Member States, it is necessary to analyse these tasks from the rule of law and legality viewpoints.

3 REGULATION OF PLATFORM CONTENT

3.1 PLATFORM REGULATION

Freedom of speech in action is practically the regulation of media. Media regulation may be based on technology (i.e., medium), content or status. Status-based regulation is the traditional regulation of mass communication and editorial/journalistic media.⁴⁷ Printers were regulated as intermediaries, but later, the regulation of print has been based on who decides the content of publication or who is the actual perpetrator. Media regulation based on technology has been a dual system: publishing as an industry has been free over the centuries, but other forms

⁴⁴ Andrés Sajó & Renáta Uitz, *Constitution of Freedom* 306–308 (OUP 2017); Albert Venn Dicey, *Introduction to the Study of Constitution* (Liberty 1983).

⁴⁵ Barendt, *supra* n. 7.

⁴⁶ Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EJIL 192 (2006). Harlow notes that the principle of legality is central to all administrative law system.

⁴⁷ Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015).

of mass media, especially electronic media, are more strictly regulated.⁴⁸ Movies and games are still censored in many countries. Content-based regulation applies more to marketing or dubious content, for example, pornography. These distinctions have created regulatory gaps, which are problematic when technologies and content converge on the internet.

From the traditional media law viewpoint, the question in regulatory analysis is whether social media is media at all. Newspapers on the internet must follow similar editorial responsibilities as print media, and other services are also considered a new form of some older media, for example, video-on-demand services. Social media platforms do not have editorial control.⁴⁹ Social media has added a new layer of complexity with the distribution of user-generated content and conversations between mostly individuals. In addition, the platforms curate and monitor content but are not considered editors of content in the sense of traditional media regulation.

This new regulatory gap is defined by the boundaries of jurisdictions and competence of the authorities.⁵⁰ The internet has become a third wheel in the still existing dual systems. The internet has been a utopia for many freedom of speech activists.⁵¹ In the beginning, the internet was decentralized and open in nature.⁵² The US Supreme Court supported this development, declaring that the internet was within the protection of the First Amendment. The actual issue is the business model of the platforms. Social media platforms do not make money through discussions or take payments directly from users; rather, they are advertising businesses that collect data and sell ads. They provide an incentive to keep users engaged on their platforms by curating and organizing content.⁵³ Sometimes, this requires moderation, but the goal of this is to curate popular – and even controversial – content more so than to perform actual regulation.

The only area in which most industrialized nations have come to an agreement is cybercrime. Here, the US, Canada, South Africa and Japan, among many others, signed the Convention of Cybercrime, which was adopted by the Council

⁴⁸ Daithí Mac Síthigh argues that media law is more like medium law. Daithí Mac Síthigh, *Medium Law* (Routledge 2018).

⁴⁹ András Koltay, *New Media and Freedom of Expression* 83 (Hart 2019).

⁵⁰ Catherine Van de Heyning, *The Internet and Constitutional Law: The Protection of Fundamental Rights and Constitutional Adjudication in Europe* (Routledge 2016).

⁵¹ John Perry Barlow, *A Declaration of the Independence of Cyberspace* (EFF 8 Feb. 1996), <https://www.eff.org/cyberspace-independence>. Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (UN Doc. A/ HRC/ 17/ 27 of 26 Apr. 2011).

⁵² Janet Abbate, *Inventing the Internet* (MIT Press 1999). The Supreme Court in *American Civil Liberties Union v. Reno* (21 USC 844 Supreme Court case of 27 Jun. 1997, No. 96.)

⁵³ Tarleton Gillespie, *Custodians of the Internet. Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press 2018).

of Europe in 2001. However, this convention focuses only on child pornography and copyright infringements.⁵⁴

Regulation can be categorized as hard regulation, soft regulation or self-regulation. Hard regulation is regulation by law, which is enforced by the state. Soft regulation is regulation by recommendations, principles and guides. In self-regulation, the regulator is the object of regulation.⁵⁵ Co-regulation is self-regulation based on laws or at least cooperation with authorities. Hard regulation is the most traditional form of regulation. In media law, the typical form of self-regulation is press councils. Co-regulation is the newest form, and it has been typical for audiovisual media, in which classification systems have been enacted by law or at least endorsed by authorities.⁵⁶

The key issue in platform regulation is the liability of intermediaries.⁵⁷ In the US, the Information Technology Act (2000), specifically with its famous section 230, guarantees an exemption of liability to intermediaries from third-party acts if the intermediary has acted in good faith. This is known as the ‘Good Samaritan’ principle.⁵⁸ In the EU, Article 14 of the E-Commerce Directive (ECD; 2000) states that digital or online platforms are not legally responsible for hosting illegal content, though they are required to remove such material once it has been flagged.⁵⁹ This obligation applies only to certain content. Article 15 of the ECD prohibits the general monitoring of content but allows for the monitoring of specific content, as well as voluntary monitoring by platforms. The question is whether the exemption requires the passive nature of an intermediary and the extent to which social media platforms are simply platforms that do not actively disseminate information. In media regulation, the assumption is that the media is the news media but with editorial control. Therefore, social media platforms are too active to be true intermediaries but not active enough to be within the traditional concept of the media.

The issues with social media are not new. The first forms of social media were Electronic Bulletin Boards (BBS) and newsgroups (Usenet), and one of the first

⁵⁴ Benoît Freedman & Isabelle Rorive, *Regulating Internet Content Through Intermediaries in Europe and the USA*, 23(1) *Zeitschrift für Rechtssoziologie* 41–60 (2002).

⁵⁵ Julia Black’s taxonomy of self-regulation is mandated private regulation, sanctioned private regulation, coerced private regulation and voluntary private regulation. Julia Black, *Constitutionalising Self-Regulation*, 59 *Mod. L. Rev.* 24 (1996).

⁵⁶ Marsden, *supra* n. 26, at 157–160.

⁵⁷ Section 230 even interprets support of the marketplace of ideas metaphor. Ben Medeiros, *Platform (Non-) Intervention and the ‘Marketplace’ Paradigm for Speech Regulation*, 3 *Soc. Media + Soc’y* 1 (2017).

⁵⁸ Eric Goldman, *An Overview of the United States’ Section 230 Internet Immunity*, in *The Oxford Handbook of Online Intermediary Liability* (Giancarlo F. Frosio ed., Oxford University Press 2020).

⁵⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 Jun. 2000 on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market (‘Directive on electronic commerce’).

laws on platforms was Sweden's Electronic Bulletin Boards Responsibility Act.⁶⁰ In Sweden, platforms are required to supervise content, and if the content breaks the law, the platforms are obliged to delete it. The definition of illegal content is based on criminal law.⁶¹ The reason for enacting the law is the Swedish freedom of speech doctrine, which is based on exclusive constitutional laws. Sweden has two constitutional acts to regulate direct freedom of speech as a fundamental right: the Freedom of the Press Act (*Tryckfrihetsförordningen*, 1949) for print media and the Fundamental Law on Freedom of Expression (*Yttrandefrihetsgrundlagen*, 1991) for electronic media. The Instrument of Government (*Regeringsform*) has incorporated freedom of speech as a general right, here based on the ECHR. Sweden is an example of how the freedom of speech doctrine and media regulation are path dependent on the context of the country. The exclusivity of the press act is a consequence of freedom of press law of 1766.⁶²

Another example of national law is Germany's Network Enforcement Act 2018 (*Netzwerkdurchsetzungsgesetz*).⁶³ This law targets large social media platforms with more than 2 million German users. These platforms are defined as internet platforms that seek to profit from providing users with the opportunity to share content with other users and the broader public. The law requires platforms to have a mechanism for users to submit complaints about content that they believe is illegal. Once a complaint has been received, the platforms must investigate whether the content is illegal, and if it is found to be 'manifestly unlawful', the content must be removed. Platforms that fail to comply risk fines of up to EUR 50 million. The definition of unlawfulness is based on the German Criminal Code. The act recognizes self-regulatory institutions as appeal bodies, and courts have the competence to review decisions.⁶⁴

The current trend is an increase in the (involuntary) voluntary monitoring of content.⁶⁵ In the EU, innovative regulation has been part of the so-called 'new approach' towards legislation, of which industry-led standardization and regulation

⁶⁰ Lag om ansvar för elektroniska anslagstavlor (1998:112).

⁶¹ Malin Edmar, *Internetpublicering och sociala medier: En juridisk vägledning* (Norstedts Juridik 2011).

⁶² Gunnar Persson, *Exklusivitetsfrågan – Om förhållandet mellan tryckfrihet, yttrandefrihet och annan rätt* (Norstedt Juridik 2002).

⁶³ The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression called the law incompatible with ICCPR. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression OL DEU 1/2017, 1 Jun. 2017.

⁶⁴ Thomas Wischmeyer, *What Is Illegal Offline Is also Illegal Online – the German Network Enforcement Act 2017*, in *Fundamental Rights Protection Online the Future Regulation of Intermediaries* (Bilyana Petkova & Tuomas Ojanen eds, Edward Elgar 2020). See also Federal Court of Justice, decisions of 29 Jul. 2021 – III ZR 192/20 and III ZR 179/20 and Federal Constitutional Court's Order of 22 May 2019, 1 BvQ 42/19.

⁶⁵ Now, the EU mixes mandatory private regulation with coerced private regulation, and the outcome is involuntary voluntary self-regulation. Black, *supra* n. 55.

are key components.⁶⁶ The European Commission has stimulated the voluntary removal of content by private companies in, for example, the Code of Conduct on Hate Speech (2016), Communication on Tackling Illegal Content (2017) and the 2018 Recommendation on Measures to Effectively Tackle Illegal Content Online.⁶⁷ In 2019, a new copyright directive mandated that platforms monitor potential infringement.⁶⁸

In 2018, the European Parliament adopted a report pushing for content monitoring to be outsourced to hosting services under the pretext of the fight against terrorism.⁶⁹ This regulation has two dimensions. First, the competent authorities of Member States issue content removal orders, requiring that content be taken down within an hour. Second, the hosting service providers are required to take effective and proportionate proactive measures. The platforms must make their own assessments of the nature of content and even proactively disable access to terrorist content.⁷⁰ On the other hand, this kind of content may fall under the scope of the abuse of rights doctrine, and the scope of the content is limited and described in detail. Therefore, the regulation of such content is clear and based on clear legislation.

The renewed Audiovisual Media Service Directive (AVMSD) requires video-sharing platforms to take appropriate measures to protect minors and the public from several types of content.⁷¹ These new obligations are effectively executed by monitoring and removing content. The regulation emphasizes self-regulation and co-regulation and requires terms of service that prohibit the dissemination of illegal content. Here, the company must assess the legality of the content. This regulation affects the relationship between platform and user, which is understood as a private relationship. The AVMSD is based on the country-of-origin principle, and for most internet companies, the competent authority is in Ireland, so Irish authorities

⁶⁶ Teresa Quintel & Carsten Ullrich, *Self-Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, Related Initiatives and Beyond*, in *Fundamental Rights Protection Online the Future Regulation of Intermediaries* (Bilyana Petkova & Tuomas Ojanen eds, Edward Elgar 2020).

⁶⁷ Tarlach McGonagle, *Free Expression and Internet Intermediaries: The Changing Geometry of European Regulation*, in *The Oxford Handbook of Online Intermediary Liability* (Giancarlo F. Frosio ed., Oxford University Press 2020).

⁶⁸ Giancarlo Frosio & Sunimal Mendis, *Monitoring and Filtering: European Reform or Global Trend*, in *The Oxford Handbook of Online Intermediary Liability* (Giancarlo F. Frosio ed., Oxford University Press 2020).

⁶⁹ Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online COM/2018/640 final.

⁷⁰ *Ibid.*, para. 6.

⁷¹ Consolidated text of Directive 2010/13/EU of the European Parliament and of the Council of 10 Mar. 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

are responsible for monitoring these video-sharing platforms and applying EU law and the laws of other Member States.⁷²

These new parts of the AVMSD constitute key elements of the private control of platforms. The directive mixes legal definitions (at both the EU and national levels) with contractual terms between user and platform. The platforms are obliged to add clauses to their terms of user contracts that justify the removal of content. The platforms are incentivized to develop instruments for monitoring and removal, such as algorithms, though this may lead to the over-removal of legal content (collateral censorship). Despite the new safeguards for users, it is very questionable how and on what basis platforms are monitored, as well as whether it is possible to force platforms to restore any removed content.⁷³

The newest EU laws are the Digital Services Act (DSA)⁷⁴ and the Digital Markets Act (DMA).⁷⁵ These new acts do not supplement the ECD, though they are complementary. The DSA defines various platform categories: very large platforms (over forty-five million users in Europe or 10% of EU consumers), normal platforms, hosting services and small platforms. Very large platforms have more obligations, while very small platforms are exempt from most obligations.

The biggest change is that practically anyone can flag content as illegal, so the hosting company must remove the content or disable access to it. In addition, the authorities can give certain entities the status of trusted flaggers, which means that their flagging has a higher priority. The status of flaggers, especially trusted flaggers, is questionable. Are they self-appointed sheriffs or just vigilantes? Do trusted flaggers exercise public power? What if some illiberal or undemocratic state uses a trusted flagger system to silence critics?

In addition, Article 18 of the DSA allows for the certification of out-of-court dispute settlement bodies. Anyone who can show independence and expertise in content moderation matters can apply to be certified by authorities. Once certification has been granted, users can request that the body review their dispute over a moderation decision. In other words, the DSA is creating a system of competing

⁷² Ireland has drafted the New Online Safety Law to counter these issues, see <https://www.gov.ie/en/publication/d8e4c-online-safety-and-media-regulation-bill/#general-scheme-of-the-online-safety-media-regulation-bill>.

⁷³ Benoît Frydman, Ludovic Hennebel & Gregory Lewkowicz, *Internet Co-Regulation and the Rule of Law*, in *Governance, Regulation and Powers on the Internet* 148–149 (Eric Brousseau, Meryem Marzouki & Cécile Méadel eds, Cambridge University Press, Cambridge 2012).

⁷⁴ Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825 final. The regulation entered into force in the fall of 2022.

⁷⁵ Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final. The Regulation entered into force in the fall of 2022.

private courts to which users can appeal. It is still unclear what the criteria are for certification or if there will be any procedural requirements for these bodies.

Companies have a huge incentive to create fast content control systems to avoid liability⁷⁶ because it would be better to remove content immediately before deciding if it is legal or illegal. This proposal includes the idea of an independent dispute settlement body to monitor content removal,⁷⁷ though the appellant must first exhaust the platform's complaint mechanism. Still, it is possible to make an appeal to a court.⁷⁸ However, the focus is on how to make complaints about the removal of content. The appeal against a refusal to remove content is much more complicated and slower. Thus, freedom of expression is protected to some extent, but the protection of other rights is questionable. Overall, the major problem with the DSA is that, compared with earlier recommendations and regulations, the scope of illegal content is broad and not precisely defined. Hate speech, the incitement of terrorism and other acts can be defined at the EU level, but the DSA also refers to the national laws of all twenty-seven Member States.

Platforms always have the choice between the law and their own terms of use.⁷⁹ Therefore, even though platforms have developed various mechanisms with which to moderate content, the process is arbitrary and not prescribed in law. It is also interesting how platforms require the status of media in some circumstances. The General Data Protection Regulation (GDPR) and other laws provide exceptions for journalism, so in that sense, some platforms consider themselves media outlets, albeit without the obligation to appoint a chief editor.⁸⁰ Therefore, it is possible to shop for different regulatory models, depending on the rights and obligations that arise from each.⁸¹

A brief review of the current issues with platforms highlights two significant observations. First, the fragmentation of freedom of speech as a human and constitutional right limits supranational and national legislators' methods of forcing new legislation.⁸² The dual system of media regulation is still strong, and because of the economic nature of the EU, competition regulation creates real boundaries for online environment rules. Second, the EU and national states – for example, Germany – are forced to rely on soft law, self/co-regulation and creating

⁷⁶ The DSA Arts 5, 14 and 15.

⁷⁷ The DSA recital 18.

⁷⁸ The DSA recital 44.

⁷⁹ Giovanni De Gregorio, *From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society*, 11 *Eur. J. Legal Stud.* 65 (2019).

⁸⁰ Bart van der Sloot, *Welcome to the Jungle: The Liability of Internet Intermediaries for Privacy Violations in Europe*, *J. Intell. Prop. Info. Tech. & Elec. Com. L.* 211–228 (2015).

⁸¹ Philip M. Napoli, *Social Media and the Public Interest: Media Regulation in the Disinformation Age* (Columbia University Press 2019).

⁸² Kettemann, *supra* n. 12, at 173–175.

involuntary voluntary arrangements. Thus, legislators are now delegating tasks that would normally belong to the authorities of private companies.⁸³ One reason for this might be that the Commission has posited Article 114 Treaty on the Functioning of the European Union as the competence to set new platform regulations. Therefore, the basis of legislation is not the fundamental rights guaranteed in the Charter but an article that is meant to guarantee the functioning of the internal markets of the EU.

3.2 REGULATION IN ECtHR AND ECJ CASE LAW

Transnational courts are important actors in defining platforms' rights and obligations. The ECJ is an interpreter of concrete EU law, whereas the ECtHR sets standards on the level of human rights protection. Therefore, ECJ praxis is more bound to context and norms, while ECtHR cases are more abstract.⁸⁴ The ECtHR has, on several occasions, underlined that platforms are significant for free speech.⁸⁵

From the viewpoint of platform regulation, the ECtHR case of *Delfi versus Estonia* is significant.⁸⁶ The background is that Delfi reported that one ferry company had destroyed several ice roads from the Estonian mainland to offshore islands. Delfi offered readers the right to respond to the article, and the comments were very offensive. The comments section had a notice-and-takedown procedure and was filtered for obscene words. The Estonian Supreme Court concluded that Delfi had not satisfied the criteria for a passive service provider (intermediary). Therefore, there was no need to request a preliminary ruling from the ECJ on the grounds of the national interpretation of the ECD. The ECtHR stated that, although Delfi's portal had filtering and the insulting messages had been deleted through a notice-and-takedown procedure, as a professional news site, Delfi had not done enough.⁸⁷ Delfi needed comments and traffic for commercial purposes; therefore, it was responsible for the content.

⁸³ Niva Elkin-Koren & Maayan Perel, *Guarding the Guardians: Content Moderation by Online Intermediaries and the Rule of Law*, in *Oxford Handbook of Online Intermediary Liability* (Giancarlo Frosio ed., OUP 2020).

⁸⁴ Alberto Miglio, *Intermediaries in the Case Law of the Court of Justice of the EU: The Interplay Between Liability Exemptions and Rules on IP Protection in Fundamental Rights Protection Online the Future Regulation of Intermediaries* (Bilyana Petkova & Tuomas Ojanen eds, Edward Elgar 2020).

⁸⁵ *Cengiz and Others v. Turkey* ECHR 2015–VIII 177, paras 51, 52. *Egill Einarsson v. Iceland* App no 24703/15 (ECtHR 7 Nov. 2017), para. 46.

⁸⁶ *Delfi AS v. Estonia* app no 64569/09 (ECtHR 16 Jun. 2015).

⁸⁷ The content of the messages is quite murky. The ECtHR states that the comments were unlawful but without providing detailed analysis. The dissenting opinion can be found in *Delfi v. Estonia*, paras 114–117. However, according to Judge Spano, the content was hate speech, unlike in the MTE case. Robert Spano, *Intermediary Liability for Online User Comments Under the European Convention on Human Rights*, in *Human Rights Law and Regulating Freedom of Expression in New Media* (Mart Susi, Jukka Viljanen, Eiríkur Jónsson & Artūrs Kučs eds, Routledge 2018).

In the context of platform regulation, the Delfi case is important because the ECtHR sets standards for the moderation and monitoring of professional news sites. In the Delfi case, the Grand Chamber of the ECtHR ruled that Estonia had not violated Article 10. Speculation regarding whether the Estonian courts should have asked for a preliminary ruling from the ECJ is now futile and theoretical. Nonetheless, for example, in ECJ case law, the commercial and promotional activities of eBay mean that it cannot rely on an exemption from liability.⁸⁸ However, from a freedom of speech point of view, it is strange to compare operators such as eBay and Delfi on the same grounds. However, the ECtHR requires professional news portals to have pre-moderation and immediately delete unlawful content.

In the cases after Delfi, the ECtHR has argued that small nonprofit associations should not be required to premonitor all user comments.⁸⁹ In the MTE and Index cases, anonymous users posted offensive comments. The ECtHR argued that the comments did not constitute clearly unlawful speech.⁹⁰ The court also applied criteria to assess violations of Article 10 for online hate speech and offensive speech cases, namely the context and content of the impugned comments, the liability of the authors for the comments, the measures taken by the website operators, the consequences of the comments for the injured party and the consequences for the applicants (websites). In the Pihl case, a post on a small, nonprofit association's blog accused the plaintive of being involved in a Nazi party. The ECtHR referred to the criteria set in the MTE and index cases. The ECtHR contrasted the commercial and journalistic character of Delfi with the small and nonprofit character of the actors in the MTE and Pihl cases. Furthermore, the ECtHR made a distinction between different forms of offensive speech: in the Delfi case, the comments were clearly unlawful, but in the latter cases, the comments were only showing bad manners. It is quite unclear how these distinctions can be foreseen. The ECtHR is creating a distinction between freedom of speech in small, nonprofit websites and freedom of speech in the context of commercial internet websites.

There are no such demands for filtering and pre-moderation in ECJ case law. In the Scarlet Extended case, the ECJ stated that the filtering requirement could be a breach of freedom of speech.⁹¹ In this case, SABAM, a Belgian management

⁸⁸ See Case C-324/09 *L'Oréal and Others v. eBay International AG and Others* EU:C:2011:474.

⁸⁹ *Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt v. Hungary* app no 22947/13 (ECtHR, 2 May 2016). *Pihl v. Sweden* app no 74742/14 (ECtHR, 9 Mar. 2017).

⁹⁰ For an analysis of both cases, see Marta Maroni, *The Liability of Internet Intermediaries and the European Court of Human Rights*, in *Fundamental Rights Protection Online the Future Regulation of Intermediaries* (Bilyana Petkova & Tuomas Ojanen eds, Edward Elgar 2020).

⁹¹ Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* Case C-70/10.

company that represents copyright owners, brought interlocutory proceedings against Scarlet, an internet service provider.⁹² The Belgian courts found copyright infringement and ordered Scarlet to take all measures to block the unlawful use of file sharing by its customers. The ECJ found that the obligation to install a filtering system would, in effect, require the company to carry out a costly general monitoring function for an unspecified period and that the measure would infringe freedom of speech. The ECJ also ruled on the case of *Eva Glwischmig-Piesczek v. Facebook* (2019) that Facebook was aware of illegal content and could not benefit from intermediary exemption.⁹³ Therefore, in this case, it was allowed to use automated tools to enforce injunction in Europe. The difference between the cases is that in the Scarlet case, the problem was general filtering and, on the latter case, specific information.

3.3 PLATFORMS AS CONTENT MODERATORS

The current and proposed regulations put platforms at the centre of regulation. Therefore, it is important to examine how ready platforms are to take responsibility. These growing demands are encouraging platforms to impose rules and police their sites. For a long time, BBSes, newsgroups and IRC channels at least had an administrator to moderate them, but they would also often have voluntary moderators who were also users. The rules that these moderators applied were set by the administrator of a site or channel, and the entire process was arbitrary.⁹⁴

The moderation of modern platforms must be professional and based on rules. This requires resources that can be costly for a company. New regulations are incentives for platforms to moderate, but quality standards depend on the companies' willingness to employ resources. In the digital rights debate, the platforms talk about human rights and see themselves as protectors of freedom of speech against states. This approach shadows the traditional state-centric perspective and rule of law doctrines, as well as other human rights, such as privacy.⁹⁵

Social media companies now remove questionable content and flag messages that, for example, are considered propaganda or fake news. In particular, flagging by Twitter sparked debate during the 2020 US presidential election. Twitter allegedly discriminated against one candidate by flagging his tweets. This led to

⁹² Case C-372/19 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Weareone. World BVBA and Wecandance NV* EU:C:2020:959, paras 39–52.

⁹³ Case C-18/18 *Eva Glwischmig-Piesczek v. Facebook Ireland Limited* [2019] ECLI:EU:C:2019:821.

⁹⁴ For an analysis of moderation, see James Grimmelman, *The Virtues of Moderation*, 17 *Yale J.L. & Tech.* 42 (2015).

⁹⁵ Rikke Frank Jørgensen, *Framing Human Rights: Exploring Storytelling Within Internet Companies*, 21 *Info. Comm. & Soc'y* 340–355; Kari Karppinen & Outi Puukko, *Four Discourses of Digital Rights: Promises and Problems of Rights-Based Policies*, 10 *J. Info. Pol'y* 314, 304–328.

another problem, namely that social media actors, in contrast to journalists, do not have an ethical obligation to be impartial and are not obliged to publish certain types of content. However, the monopolistic and exclusive nature of social media platforms means that they control public debate.⁹⁶

The terms of service of the platform may be quite general, but the actual guidelines for moderators must be precise and leave little room for discretion.⁹⁷ These platforms operate across almost all countries in the world, so guidelines must take into account different cultures, values and languages. At the moment, it is a significant problem that content control for less-used languages is weaker than that for major languages.⁹⁸ In addition to monitoring content within the framework of their own rules, companies should also understand EU law and, partially, national laws when monitoring communications specific to certain languages and cultures. Recent studies and news on moderation by social media are ambivalent. Social media companies utilize artificial intelligence and algorithms, but the proposed EU regulations demand that humans have control over decisions. Here, the quality of moderation is a different story.

Moderators are typically paid relatively little, and such services are often outsourced to workers in low-wage countries.⁹⁹ Moderation is also a very stressful job, and during the COVID-19 pandemic, more and more moderation was given to algorithms. In addition, platforms have outsourced some parts of monitoring to users by giving them the option to flag content as illegal. Obviously, this opens the door to flagging in bad faith, which could lead to future liability under the DSA. Another issue is the internal rules for moderation. For example, Facebook had a hate speech rule that protected groups as a whole but not the subsets of a group.¹⁰⁰

There have been many scandals and headlines about moderation. The current quality of moderation is questionable. Whistleblower Frances Haugen and the so-called Facebook Files have shown that Facebook allocates 87% of its budget to combating misinformation to issues and users based in the US, even though these users make up just about 10% of the platform's daily active users. The result is that moderation activities in Europe are not a priority for Meta or other platform companies. Small countries and small languages are especially moderated by

⁹⁶ Nicolas Suzor has analysed the contractual terms of the service of fourteen major social media platforms, finding that there is a gap between the requirements of good governance and the systems of contract law. Nicolas Suzor, *Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms*, Soc. Media + Soc'y 4 (2018).

⁹⁷ Gillespie, *supra* n. 53.

⁹⁸ What is quite surprising is that the moderation of COVID-19 fake news in Spanish has been problematic.

⁹⁹ Sarah T. Roberts describes moderators' working conditions, both in the US and other countries. Sarah T. Roberts, *Behind the Screen: Content Moderation in the Shadows of Social Media* (Yale University Press 2019).

¹⁰⁰ Suzor, *supra* n. 12.

moderators whose location might be far away from most users. It is not likely that algorithms can be developed to monitor small languages, at least in the near future.

Regulation may give companies an incentive to moderate content, but the dual nature of norms reflects the ways in which users can exercise their rights. If the removal of content is justified by law, the legal remedies guaranteed by the ECHR, the EU and national laws should apply, at least in theory. If the removal of the content is based on platform rules or other regulations imposed by the company, there are few safeguards, even if the user can go to court; the national courts in Europe, especially in Germany, have made decisions in which the platform's decision to remove content or ban users is considered unfair in terms of freedom of speech.

The most notable internal regulatory organ is Facebook's Oversight Board, which upholds or reverses the content decisions made by moderators for Facebook and Instagram.¹⁰¹ Lee A. Bygrave calls Facebook's terms and conditions 'Lex Facebook',¹⁰² in that it is quite a hierarchical normative system whereby Facebook seeks legitimacy for its content governance. Its supreme principals are 'Facebook Values', followed by 'Community Standards' in the second tier, while the lower level consists of 'Internal Implementation Standards' and algorithm protocols. The latter are not public, even though some moderators have casually leaked documents. Facebook and YouTube have set an earlier similar body in Germany, *Freiwillige Selbstkontrolle Multimedia-Diensteanbieter* (FSM). It has been certified as a self-regulation institution under the *NetzDG*. Both platforms can ask the FSM to decide tough content removal cases.

Standards and protocols are in a constant state of change, whereas values and standards are more permanent. Lex Facebook appears to reference human rights when its decision makers seek guidance. The board's core function is to review the content enforcement decisions and determine whether they have been consistent with Facebook's content policies and values in interpreting community standards. Article 1.4 of the board's bylaws limits its competence to bylaws – in other words, to Lex Facebook and the selected complementary norms.

To appeal to the board, a decision must be eligible for appeal. Content that is illegal in a jurisdiction with a connection to that content is not eligible for appeal. If the removal of content is justified by law, it is not eligible. The company interprets the legality of the content and its eligibility. Facebook and Instagram can also refer hard cases to the board, which issued its first decisions in January 2021.¹⁰³ In its cases, the board referred to Lex Facebook and international human

¹⁰¹ See Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 *Yale L.J.* 2418 (2020).

¹⁰² Lee A. Bygrave, *Internet Governance by Contract* (Oxford University Press 2015).

¹⁰³ See Riku Neuvonen & Esa Sirkkunen, *Outsourced Justice: The Case of the Facebook Oversight Board*, *Journal of Digital Media & Policy* (2022), online first article, https://doi.org/10.1386/jdmp_00108_1.

rights standards, especially the ICCPR. It seems that the board has sought broader legitimacy by invoking human rights. The problem is that the ICCPR is not mentioned or referred to on Lex Facebook, and it is not foreseeable that decisions should be based on the ICCPR. In addition, the ECHR and the Charter are more binding human rights treaties in Europe.

4 CONCLUSION

‘Account suspended. Twitter suspends accounts that violate Twitter rules’.

These were the words posted on the Twitter page of the former President of the United States after access to the page was suspended.¹⁰⁴ One of the most powerful people in the world had been taken down by the rules of a single company.

The regulation of platforms is a multifaceted issue from the viewpoint of freedom of speech, which is an ambivalent concept with overlapping rights and doctrines. Multipolar fundamental rights situations are increasing on the internet. Media regulation has problems with concurring rights, the tradition of dual regulation and various free speech doctrines. Supranational actors, such as the EU and national states, have not only an obligation to respect rights, but also an obligation to actively protect them. Therefore, the obligation to protect individual rights and common interests against phenomena such as harassment, hate speech, false information and racism conflicts with the liberal definition of free speech.

Traditional regulation is based on jurisdiction and the competence of states and supranational organizations. Platforms operate on a global level in which regulation is softer and fragmented under various jurisdictions. The EU and certain national states oblige the modern publisher, intermediary or platform to monitor and moderate content. The solution is similar to what rulers enforced on printing hundreds of years ago. However, it now jeopardizes the principles of freedom of speech and the rule of law making private companies monitors and enforces of law, especially criminal law.

The freedom of speech doctrine, the freedom of the internet and the rule of law principle are historically intertwined. In particular, the American absolute free speech doctrine has a strong influence on how various platforms have developed. In self-regulation and co-regulation, there is no actual reciprocity on the part of platforms, which have no incentive to support free speech, public debate or fundamental rights; their business model is to sell advertising and collect data by curating content. Moreover, traditional media, governments, organizations, politicians and virtually everyone else fall into that cycle by using the services of a few

¹⁰⁴ The suspension ended in late 2022 when Elon Musk bought Twitter.

platform providers. Even the EU is active on all social media platforms and is part of the operational logic of these platforms.¹⁰⁵

For decades, the internet was open to various countercultures, and censorship was practically impossible. Social media – and a few companies in particular – have a dominant position in controlling public debate. These companies curate and moderate the content of billions of users.¹⁰⁶ The companies' own moderation has raised more questions and scandals than it has provided solutions for. Algorithms and even human moderators have caused scandals by deleting and, conversely, clearly failing to delete illegal content. The Oversight Board of Facebook may be no more than a quasi-court with a primary duty of legitimating Meta platforms, though it does not eliminate the fundamental problem of private companies interpreting and enforcing not only private rules, but also laws. When a court makes a decision, it must weigh competing (and concurring) rights and interests. Court decisions are publicly available and can be appealed. According to new regulatory models, the decision regarding the content of the messages can be made by artificial intelligence or an underpaid worker somewhere far away. Co-regulation or self-regulation is a good alternative to global regulation, but hard regulation is required as well, especially in the regulation of fundamental rights. Otherwise, the freedom of speech doctrine and rule of law principle are in danger, and regulation might not achieve its goals.

The main problem is now access to content. The DSA, DMA and other regulations are freezing the status quo, instead of changing the landscape through competition and new innovations. In exchange for effective regulation, the position of current platforms, as core services, is being secured. Barter is similar to medieval rules made with printers.¹⁰⁷ Self-regulation is an excellent regulatory model, but only when the authorities guarantee fundamental rights and the rule of law.

¹⁰⁵ Eli Pariser argues that the limits of data are the limits of the world. Eli Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (Penguin 2012).

¹⁰⁶ Klonick, *supra* n. 101.

¹⁰⁷ James Van Horn Melton, *The Rise of the Public in Enlightenment Europe* (Cambridge University Press 2001).

