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FROM FLORIDA AND TEXAS TO KARLSRUHE: ONLINE PLATFORMS AS PUBLISHERS OF YORE OR AS (UN)COMMON CARRIERS?

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Introduction

The question as to the most apt regulatory model to apply to the internet is one that occupies legislators, policymakers and courts, at both national and international level. In its genesis, this new medium was conceived of as a 'common carrier medium', free from government control. John Perry Barlow, author of 'A Declaration of the Independence of Cyberspace', proclaimed in 1996 that national sovereignty should not extend to the realm of the internet. A lot of water has flowed under the bridge since Barlow's romanticised vision of cyberspace. In recent times, big platforms, under increasing pressure to curb the spread of disinformation and hate speech, have gradually become more susceptible to the notion of some form of state regulation. Mark Zuckerberg argued that Facebook should not be called to make fine balancing judgements on free speech without democratic oversight (Wintour, 2020).

Content moderation is the 'central service platforms offer', the added value that sets them apart from the open web (Gillespie, 2018). With the help of algorithms and of human moderators, they moderate obscene or violent content out of a sense of corporate social responsibility but also on economic grounds, so as to remain an attractive environment for users and advertisers alike (Klonick, 2018). The editorial-like judgements platforms make about users' speech are carried out with little transparency or accountability (Heims, 2017; Ammori, 2014). Users can access the platforms' terms of service, but these typically consist of broad guidelines, which provide inadequate insight into the exact types of content that fail to pass muster. Since the 2016 Trending News controversy, the criticism that platforms are engaged in a concerted effort to silence conservative speech persists.

The Texas and Florida laws

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Both Texas and Florida adopted 'anti-online censorship' laws to prevent platforms from engaging in viewpoint-based censorship of users' posts.[1] NetChoice, a trade association representing large social media platforms, challenged these laws. The platforms argued that their content curation is protected speech, and that they are publishers akin to newspapers. The challenges let to two contrasting judgements. The Court of Appeals for the Fifth Circuit likened platforms to common carriers, which are subject to non-discrimination requirements. It disputed that their content curation amounts to First Amendment protected speech and upheld the constitutionality of the Texas law.[2] The Court of Appeals for the Eleventh Circuit, on the other hand, rejected platforms' characterisation as common carriers. It argued that their content moderation decisions are First Amendment protected editorial judgements and declared the Florida law unconstitutional.[3] The Supreme Court held that neither of the Courts performed the constitutional analysis correctly, and remanded the cases.

The Supreme Court and the diametrically opposed Texas and Florida judgments show that the dice have not yet been cast as regards the regulatory model for online platforms, and that comparisons between old and new media are prevalent. However, the usefulness of such comparative exercises is doubtful and might obscure rather than clarify the issues at stake (Pasquale, 2016; Katsirea, 2024). Newspapers mostly run their own content and exhibit their own editorial voice, while online platforms merely provide links to foreign content, thus resembling broadcasters or cable operators who choose what to include in their schedules. The analogy to broadcasters or to common carriers has been favoured by some in view of the increasingly invasive and ubiquitous nature of the internet and of the scarcity of attention and diversity in a highly concentrated online environment (Desai, 2022). The choice of analogy matters. Comparing online platforms to common carriers means tackling monopolistic or near-monopolistic power and ensuring neutrality in access (Sabeel Rahman 2018). Comparing them to broadcasters means subjecting them to substantive regulations in the public interest (Kennedy, 2022).

Taming online platforms by human rights?

A further avenue by which to reign in the power of online platforms, and one that the above judgments did not address, is by subjecting them to human rights. In the US, the question whether users should be able to assert their First Amendment rights against social media platforms is discussed in the light of the state action doctrine. This doctrine stipulates that First Amendment rights are only guaranteed against the state, not against private corporations (Hooker, 2019). Private actors may exceptionally be subject to constitutional restrictions if they exercise 'essentially a public function' or if they provide services 'traditionally exclusively reserved to the State'.[4] This has been declined in the case of an email service or a cable channel.[5] The extension of the state action

[1] H.B. No. 20 <https://perma.cc/9KF3-LEQX>; Senate Bill 7072 <http://laws.flrules.org/2021/32#page=9> accessed 28 February 2024.
[2] *NetChoice, LLC v Ken Paxton* (5th Cir 2022).
[3] *NetChoice, LLC v Att'y Gen.* 34 F.4th 1196 (11th Cir 2022).
[4] *Marsh v Alabama*, 326 U.S. 501 (1946)*; Jackson v Metropolitan Edison Company*, 419 U.S. 345 (1974).
[5] *Cyber Promotions, Inc v AOL, Inc* 948 F. Supp. 436 (1996); *Manhattan Community Access Corp. v Halleck*, 139 S. Ct. 1921 (2019).

doctrine to online platforms has been viewed as problematic as it would likely undermine their power to exercise editorial control over speech.[6]

In Germany, the question of platform regulation by human rights has been fought in manifold court cases, and has divided courts and commentators alike. Some argue that the internet giants should be bound by free speech guarantees like the state in view of their position as the digital public square, and should hence not be allowed to delete lawful content (Schwartmann and Mühlenbeck, 2020). Others claim that private platforms should not be equated with the state, and that they should have the freedom to engage in meaningful content moderation of content that is 'lawful but awful'. If social media networks had to fully protect free speech rights, they would need to keep up a lot of unpalatable content (Holznagel, 2019; Friehe, 2020). The position of the German Constitutional Court (BVerfG) on this intricate question is still unclear. Since the seminal *Lüth* case, it is recognised that fundamental rights can exercise an indirect-third-party-effect on relations between private parties.[7] In the *Fraport* case, the BVerfG held that this indirect binding force of fundamental rights can be the same as that applicable to the state in the case of private entities that 'take over the provision of public communications and thus assume functions which we previously allocated to the state'.[8]

Meanwhile, the EU Digital Services Act attempts to render private online platforms more accountable, not least by obliging them to respect the fundamental rights of their users when moderating online content. This signals a move towards a horizontal application of fundamental rights by fiat of EU legislation (Bayer 2024).

Conclusion

This paper proposes to contribute to the debate about platforms' power of content moderation by adopting a comparative constitutional methodology to test, first, the historical analogies in the Florida and Texas cases, and secondly, the limits of a human rights-based approach for online platforms. The merits and demerits of the proposed models of internet regulation, and their capacity to unmake the industry underpinning the internet will be examined, before asking whether human rights due diligence is conducive to enhancing platforms' accountability, or would rather entice them to only pay lip service to human rights so as to preserve their editorial authority (Sander 2020).

REFERENCES

Ammori, M., 'The 'New' New York Times: Free speech lawyering in the age of Google and Twitter' (2014) 127 *Harvard Law Review* 2259.

Balkin, J. M., 'Information fiduciaries and the First Amendment' (2016) 49 *UC Davis Law Review* 1183.

[6] *Manhattan Community Access Corp. v Halleck*, 139 S. Ct. 1921 (2019).
[7] BVerfG, judgement of 15 January 1958 – 1BvR 400/51.
[8] BVerfG, judgement of 22 February 2011 – 1BvR 699/06, para. 59.

Bayer, J., *Digital Media Regulation within the European Union. A framework for a new media order* (Nomos 2024)

Collins, R., ‘Hierarchy to homeostasis? Hierarchy, markets and networks in UK media and communications governance’ (2008) 30 (3) *Media, Culture & Society* 295.

Desai, A. C., 'Regulating Social Media in the Free-Speech Ecosystem' (2022) 73(5) *Hastings Law Journal* 1481.

Friehe, M., ‘Löschen und Sperren in sozialen Netzwerken‘ (2020) NJW 1697.

Gillespie, T., *Custodians of the Internet: Platforms, content moderation, and the hidden decisions that shape social media* (Haven: Yale University Press, 2018), 20.

Gillespie, T., ‘Platforms are not intermediaries’ (2018) 2 (2) *Georgetown Law Technology Review* 198.

Heims, M., ‘The brave new world of social media censorship’ (2017) 127 *Harvard Law Review Forum* 325.

Holznagel, D., ‘Put-back- Ansprüche gegen soziale Netzwerke: Quo vadis?‘ (2019) 8 CR 518.

Hooker, M. P., ‘Censorship, free speech & Facebook: Applying the First Amendment to social media platforms via the public function exception’ (2019) 15 (1) *Washington Journal of Law, Technology & Arts* 36.

Katsirea, I., *Press freedom and regulation in a digital era: A comparative study* (OUP, forthcoming May 2024).

Kennedy, C., 'Solving the NetChoice Dilemma: Reducing Speech Protections on Internet Platforms with Broadcast Case Law' (2022) 37 Berkeley Tech LJ 1293.

Klonick, K., ‘The new governors: The people, rules and processes governing online speech’ (2018) 131 *Harvard Law Review* 1598

McQuail, D., *McQuail’s Mass Communication Theory* (6th edn Sage 2011).

Pasquale, F., ‘Platform neutrality: Enhancing freedom of expression in spheres of private power’ (2016) 17 *Theoretical Inquiries in Law* 487.

Sabeel Rahman, K., ‘Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities’ (2018) 2 *Georgetown Law Technology Review* 234.

Sander, B., 'Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation' (2020) 43 (4) *Fordham International Law Journal* 939.

Schwartmann, R. and R. L. Mühlenbeck, ‘NetzDG und das virtuelle Hausrecht sozialer Netzwerke‘ (2020) *Zeitschrift für Rechtspolitik* 170.

Wintour, P., ‘Mark Zuckerberg: Facebook must accept some state regulation’ (*The Observer*, 15 February 2020) <https://www.theguardian.com/technology/2020/feb/15/mark-zuckerberg-facebook-must-accept-some-state-regulation> accessed 28 February 2024.